

MISSOURI STATE PUBLIC DEFENDER

GUIDELINES FOR REPRESENTATION

May, 2021

## **FOREWORD**

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The Missouri Public Defender published its first Guidelines for Representation in 1992. Many of those guidelines have become out-of-date or irrelevant. A committee was established in 2014 that worked to revise those guidelines, and they did. Those revisions, with further updates as of 2021, are published here. Our mission statement provides:

The mission of the Missouri State Public Defender is to provide high quality, zealous advocacy for indigent people who are accused of crime in the State of Missouri. The lawyers, administrative staff, and support staff of the Missouri State Public Defender will ensure that this advocacy is not compromised. To provide this uncompromised advocacy, the Missouri State Public Defender will supply each client with a high quality, competent, ardent defense team at every stage of the process in which public defenders are necessary.

With these principles in mind, MSPD sets forth these Guidelines for Representation to guide our staff in fulfilling our commitment to the constitutional right to counsel for the poor accused of crime in Missouri.

## Table of Contents

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FOREWORD.....	2
<b>I. GENERAL PRINCIPLES AND ETHICS .....</b>	<b>13</b>
<b>I-1 General Role and Duties of Defender .....</b>	<b>13</b>
I-1.1 Duties of Defender .....	13
I-1.2 Professional Relationships .....	13
<b>I-2 General Ethical Obligations of Defender .....</b>	<b>13</b>
I-2.1 Informal and Formal Advisory Ethical Opinions.....	13
I-2.2 Bar Complaints .....	14
<b>I-3 Education, Training, and Experience of Defender .....</b>	<b>14</b>
I-3.1 Education and Training .....	14
I-3.2 Experience.....	14
<b>I-4 Appropriate Client Boundaries .....</b>	<b>14</b>
I-4.1 Policies of Secure Facilities .....	14
I-4.2 Posting Bond for Client Prohibited .....	15
I-4.3 Sexual Relationship with Client Prohibited.....	15
I-4.4 Transportation of Client and Witnesses Limited .....	15
<b>I-5 Delegation of Duties to Non-Attorney Staff .....</b>	<b>15</b>
I-5.1 Responsibility for Staff Ethical Breaches.....	15
I-5.2 Supervision of Delegated Work.....	15
<b>I-6 Responding to Media Inquiries.....</b>	<b>15</b>
I-6.1 Case Specific Media Inquiries and Outreach .....	15
I-6.2 General Media Inquiries .....	16
<b>I-7 Punctuality in Court Appearances and Appointments.....</b>	<b>16</b>
<b>I-8 Conflicts of Interest.....</b>	<b>16</b>

I-8.1 Checking for Conflicts .....	16
I-8.2 Representing Client and Witness against the Client Prohibited .....	16
I-8.3 Representing Multiple Co-Defendants Prohibited .....	16
I-8.4 Office Employee Personal Conflicts—Employee Becomes Witness, Victim, or Has Personal Stake .....	16
<b>I-9 Representation of Persons outside Geographic MSPD Office Area .....</b>	<b>17</b>
<b>I-10 Disposition of Detainers and Other Pending Charges .....</b>	<b>17</b>
<b>I-11 Fugitive Complaints and Extradition .....</b>	<b>17</b>
1-11.1 Counseling Client Regarding Extradition Law .....	17
1-11.2 Bonds in Extradition Cases .....	18
<b>I-12 Advising and Representing Suspects and Witnesses .....</b>	<b>18</b>
I-12.1 Representation of Suspects .....	18
I-12.2 Legal Advice to Witnesses in Client's Case .....	18
I-12.3 Independent Advice to or Representation of Witnesses Who May Incriminate Themselves .....	18
I-12.4 Independent Advice and Representation of Witnesses Who Do Not Want to Testify .....	19
I-12.5 Spousal Privilege .....	19
I-12.6 Representation of Witness by Conflict Defender – Immunity Proceedings .....	19
I-12.7 Independence of Counsel for Witness .....	20
<b>I-13 Client File Policies .....</b>	<b>20</b>
I-13.1 Client Files – General Policies .....	20
I-13.2 Client Files – Maintenance of Files .....	20
I-13.3 Client Files – Requested by Client .....	22
I-13.4 Client Files – Released to Third Parties at Client's Request .....	22

I-13.5 Client Files – Documenting File Requests.....	22
I-13.6 Altering Client’s File .....	22
I-13.7 Prosecutor Access to Client File Prohibited.....	22
I-13.8 Post-conviction Defender Access to Client File .....	23
<b>I-14 Continuing Obligation of Representation—Successor Counsel .....</b>	<b>23</b>
<b>I-15 Standby, Hybrid, and Advisory Counsel.....</b>	<b>23</b>
I-15.1 Standby, Hybrid, or Advisory Role Prohibited by Rule.....	23
I-15.2 Objection to Appointment as Standby, Hybrid, or Advisory Counsel .....	23
I-15.3 Duty When Appointed as Standby, Hybrid, or Advisory Counsel.....	24
I-15.4 Defendant’s Right to Revoke Request for Standby, Hybrid, or Advisory Counsel .....	24
<b>I-16 Defender Workload.....</b>	<b>24</b>
I-16.1 MSPD Procedures When Workload Creates Conflict between Clients .....	24
<b>II. CLIENT CONTACT, COMMUNICATION, AND CARE .....</b>	<b>25</b>
<b>II-1 Quality and Content of Client Communication .....</b>	<b>25</b>
II-1.1 Barriers to Communication.....	25
II-1.2 Initial Counseling.....	25
II-1.3 Pretrial Release Questions .....	26
II-1.4 Initial Interview.....	26
II-1.5 Notice of Court Dates and Hearings .....	27
II-1.6 Communication Regarding Motions .....	27
II-1.7 Providing Documents to Client .....	28
<b>II-2 Frequency and Manner of Client Contact .....</b>	<b>28</b>
II-2.1 Initial Contact by Defender before Preliminary Hearing .....	28

II-2.2 Initial Engagement Letters.....	28
II-2.3 Initial Contact with Incarcerated Clients .....	29
II-2.4 Monthly Contact with Incarcerated Clients .....	29
II-2.5 Initial Contact with Clients Not in Custody .....	29
II-2.6 Monthly Contact with Clients Not in Custody .....	29
II-2.7 Available Appointment Times.....	30
<b>II-3 Contact with Significant Others.....</b>	<b>30</b>
II-3.1 Client Consent to Contact with Significant Others .....	30
II-3.2 Client Does Not Consent to Contact with Significant Others .....	30
<b>II-4 Resources for Favorable Disposition.....</b>	<b>30</b>
<b>II-5 Incarcerated Client Care .....</b>	<b>31</b>
<b>II-6 Collateral and Ancillary Representation .....</b>	<b>31</b>
II-6.1 Permissible Scope of Representation.....	31
II-6.2 Referral to Private Attorneys, Agencies, Public Administrator .....	32
<b>II-7 Appropriate Grooming and Clothing of Client and Witnesses for Court Appearances.</b>	<b>32</b>
II-7.1 Client Clothing and Grooming for Court Appearances.....	32
II-7.2 Witness Clothing and Grooming for Testimony.....	33
<b>II-8 Client's Failure to Appear.....</b>	<b>33</b>
II-8.1 Confidentiality.....	33
II-8.2 Candor with Court.....	33
II-8.3 Attempts to Contact Client Regarding Failure to Appear.....	33
II-8.4 Steps to Notify Client and Facilitate Release on Bond if Capias Does Issue .....	33
<b>III. MENTAL HEALTH.....</b>	<b>34</b>

<b>III-1 Mental Health Overview.....</b>	<b>34</b>
III-1.1 Investigation and Records Collection Prior to Engaging Expert .....	34
III-1.2 Type of Evaluation, Private vs. Court Ordered Department of Mental Health Evaluation .....	35
III-1.3 Procedures for Private Evaluation.....	37
III-1.4 Whether to Request Expert Report (only applies with private evaluations—if it's a court ordered DMH evaluation there will be a report that goes to the parties and the court) .....	38
<b>III-2 Court-Ordered Evaluations for Competency .....</b>	<b>38</b>
III-2.1 Limiting Court-Ordered Evaluations to Competency.....	38
III-2.2 Objections to Involuntary Medication.....	38
<b>III-3 NGRI or Not Guilty by Reason of Mental Disease or Defect Defense .....</b>	<b>39</b>
III-3.1 Consequences of Pursuing NGRI Defense .....	39
III-3.2 Procedure for Pursuing NGRI Defense.....	39
III-3.3 Filing Notice of NGRI Defense .....	39
<b>III-4 Conditional and Unconditional Release .....</b>	<b>39</b>
<b>III-5 Involuntary Civil Commitment under Sec. 632.415 .....</b>	<b>40</b>
<b>IV. IMMIGRATION.....</b>	<b>40</b>
<b>IV-1 Birthplace Inquiry during Initial Client Conference .....</b>	<b>40</b>
<b>IV-2 Investigation of Consequences of Immigration Status .....</b>	<b>40</b>
<b>IV-3 Advice to Non-citizen Client .....</b>	<b>40</b>
<b>IV-4 Duty to Seek Client's Goals.....</b>	<b>40</b>
<b>V. INITIAL COURT APPEARANCES .....</b>	<b>40</b>
<b>V-1 Initial Appearance.....</b>	<b>40</b>
V-1.1 Protection of Client's Rights .....	40

V-1.2 Opportunity for Early Discovery .....	41
V-1.3 Opportunity to Request Pretrial Release .....	41
<b>V-2 Bail Hearing.....</b>	<b>41</b>
V-2.1 Favorable Bail Conditions to Be Sought at Earliest Opportunity .....	41
V-2.2 Familiarity with Bail Laws and Local Practices.....	41
<b>V-3 Preliminary Hearing .....</b>	<b>41</b>
V-3.1 Purpose of Preliminary Hearing .....	41
V-3.2 Timing of Preliminary Hearing.....	41
V-3.3 Preparation for Preliminary Hearing .....	41
V-3.4 Decision Whether to Waive Preliminary Hearing .....	41
V-3.5 Special Considerations for Murder and Serious Felony Cases .....	42
V-3.6 Recording Preliminary Hearing .....	42
V-3.7 Conduct of Preliminary Hearing.....	42
VI. CASE PREPARATION .....	43
<b>VI-1 Client File Contents .....</b>	<b>43</b>
VI-1.1 Contents .....	43
VI-1.2 Manner of Documentation.....	43
<b>VI-2 Early Discovery .....</b>	<b>43</b>
VI-2.1 Informal Discovery from Prosecutor .....	43
VI-2.2 Copies of Court Records, Search Warrants and Returns, etc.....	44
VI-2.3 Preservation of Evidence .....	44
<b>VI-3 Protecting the Client during the Early Stages of the Proceeding.....</b>	<b>44</b>
VI-3.1 Prosecutor Requests for Non-Testimonial Evidence Such as Handwriting or Physical Specimens .....	44

VI-3.2 Investigative Subpoenas and Search Warrants during Discovery Phase.....	44
VI-3.3 Rights to Silence and Against Self-Incrimination.....	44
VI-3.4 Victim's Rights Issues .....	44
<b>VI-4 Discovery .....</b>	<b>45</b>
VI-4.1 Written Discovery Requests Required .....	45
VI-4.2 Additional Discovery Pursuant to Rule 25.04 .....	45
VI-4.3 Measures to Compel Response to Discovery .....	45
VI-4.4 Duty to Provide Discovery to State Only Upon Formal Request.....	45
<b>VI-5 Investigation .....</b>	<b>45</b>
VI-5.1 Duty to Investigate.....	45
VI-5.2 Preservation of Evidence .....	46
VI-5.3 Preliminary Considerations.....	46
VI-5.4 Clear and Timely Requests for Investigation.....	46
VI-5.5 Case-specific Investigation.....	46
VI-5.6 Dealing with Physical Evidence Not in the State's Possession .....	47
VI-5.7 Investigation Prerequisite to Recommendation of a Plea .....	48
<b>VI-6 Theory of the Case .....</b>	<b>48</b>
<b>VI-7 Pre-trial Motion Practice.....</b>	<b>48</b>
VI-7.1 Pre-trial Motions That Should Be Considered in All Cases .....	49
VI-7.2 Requirement that Motions Cite Both State and Federal Constitution .....	49
VI-7.3 Preparing Pretrial Motions.....	49
VI-7.4 Manner of Arguing Pretrial Motions.....	50
<b>VII. GUILTY PLEAS .....</b>	<b>50</b>

<b>VII-1 Client with No Prior Felony Pleas or Convictions .....</b>	<b>50</b>
VII-1.1 Negative Consequences of Felony Conviction.....	50
VII-1.2 Case Review Prior to Plea that Would Result in Client Becoming a Felon.....	50
<b>VII-2 Conduct of Plea Negotiations .....</b>	<b>51</b>
VII-2.1 Negotiations Not to Be Initiated Without Client Consent .....	51
VII-2.2 Purpose of Negotiations to Achieve Client's Goals.....	51
VII-2.3 Duty to Timely Convey Offers.....	51
VII-2.4 Duty to Document Plea Negotiations.....	51
<b>VII-3 Discussions with Client Regarding Plea Negotiations.....</b>	<b>51</b>
VII-3.1 Advisory Role of Defender .....	51
VII-3.2 Admission of Guilt Not Sufficient Reason to Recommend Offer.....	51
VII-3.3 Undue Influence or Coercion Improper Even When Defender Believes a Different Decision in Client's Best Interests.....	52
<b>VII-4 Continuing Duty to Prepare.....</b>	<b>52</b>
<b>VII-5 Prerequisites of Guilty Pleas .....</b>	<b>52</b>
<b>VII-6 Advice Regarding Parole Eligibility .....</b>	<b>53</b>
<b>VII-7 Investigating Alternatives to Incarceration .....</b>	<b>53</b>
<b>VII-8 Attorney Withdrawal Where Inadequate Time to Prepare Before Guilty Plea .....</b>	<b>53</b>
<b>VIII. TRIAL .....</b>	<b>53</b>
<b>VIII-1 General Trial Preparation .....</b>	<b>53</b>
<b>VIII-2 Trial Checklist and Organization .....</b>	<b>54</b>
<b>VIII-3 Client's Waiver of Right to Jury Trial and Advice Regarding Bench Trial .....</b>	<b>56</b>
<b>VIII-4 Invoking the Rule for Sequestration of Witnesses.....</b>	<b>56</b>
<b>VIII-5 Stipulations .....</b>	<b>56</b>

<b>VIII-6 Voir Dire and Jury Selection.....</b>	<b>56</b>
VIII-6.1 Preparation for <i>Voir Dire</i> .....	56
VIII-6.2 Examination of Prospective Jurors .....	57
VIII-6.3 Challenges .....	57
VIII-6.4 Further Investigation after Selection.....	58
<b>VIII-7 Opening Statement.....</b>	<b>58</b>
VIII-7.1 Timing of Opening Statement .....	58
VIII-7.2 Goals and Limitations of Opening Statement .....	58
<b>VIII-8 Confronting the State's Case .....</b>	<b>58</b>
VIII-8.1 Cross Examination, Including Impeachment and Challenges to Witness Competency..	58
VIII-8.2 Response to Undisclosed Evidence.....	59
<b>VIII-9 Motions for Judgment of Acquittal at Close of State's Case and Close of All the Evidence .....</b>	<b>59</b>
VIII-9.1 Motion for Judgment of Acquittal at Close of State's Case.....	59
VIII-9.2 Motion for Judgment of Acquittal at Close of All the Evidence.....	59
<b>VIII-10 Preparing &amp; Presenting the Defense Case.....</b>	<b>59</b>
VIII-10.1 Discussion with Client about Whether to Present Defense Case.....	59
VIII-10.2 Preparation for Defense Case .....	60
VIII-10.3 Conduct of Direct Examination .....	60
VIII-10.4 Offer of Proof When State's Objection Sustained .....	60
VIII-10.5 Client Testimony .....	60
VIII-10.6 Preventing Improper Cross-Examination of Defense Witnesses and Redirect .....	60
<b>VIII-11 Closing Argument.....</b>	<b>60</b>
<b>VIII-12 Jury Instructions.....</b>	<b>61</b>

VIII-12.1 Preparation for and Conduct of Jury Instruction Conference .....	61
VIII-12.2 Deviations by Court in Reading Instructions .....	62
VIII-12.3 Supplemental Instructions after Deliberation Commences.....	62
<b>VIII-13 Jury Deliberation and Verdict.....</b>	<b>62</b>
VIII-13.1 Requests for Exhibits .....	62
VIII-13.2 Questions from the Jury.....	62
VIII-13.3 Extended Deliberations and “Hammer Instruction” .....	62
VIII-13.4 Procedure after Guilty Verdict .....	62
VIII-13.5 No Jury Polling After Acquittal.....	63
<b>VIII-14 Establishing Appellate Record .....</b>	<b>63</b>
VIII-14.1 Ensuring Proceedings Are Recorded, Stenographer Preferable .....	63
VIII-14.2 Limitations of Pre-trial Motions and Need to Renew Objection at Trial or Make Offers of Proof.....	63
VIII-14.3 Preserving Rulings and Rationale on the Record.....	64
VIII-14.4 Seeking Appropriate Relief When Objection Sustained .....	64
VIII-14.5 Preserving Exhibits.....	64
VIII-14.6 Describing Improper Behavior for the Record to Preserve Objection .....	65
<b>VIII-15 Motion for New Trial.....</b>	<b>65</b>
VIII-15.1 Safeguarding Client’s Right to Appeal .....	65
VIII-15.2 Requesting Additional Time to File Motion after Jury Finding of Guilt.....	65
VIII-15.3 New Trial Motion Should Not Be Filed After Bench Trial .....	65
VIII-15.4 Contents of Motion for New Trial .....	65
VIII-15.5 Seeking Timely Ruling on Motion for New Trial.....	66
VIII-15.6 Preparing to Argue the Motion for New Trial.....	66

VIII-15.7 Motion for New Trial After Discharge of Jury Without Reaching a Verdict.....	66
IX. SENTENCING.....	66
<b>IX-1 Waiver of Jury Sentencing.....</b>	<b>66</b>
IX-1.1 Discussion and Advice to Client Regarding Waiver .....	66
IX-1.2 Timing of Waiver .....	66
<b>IX-2 Sentencing Hearing—Preparation and Conducting .....</b>	<b>66</b>
IX-2.1 Sentencing Phase in Bifurcated Trial .....	66
IX-2.2 Sentencing Hearing.....	67
IX-2.3 Request for Appeal Bond.....	68
IX-2.4 Advice Regarding Effectiveness Inquiry .....	68
<b>IX-3 Post-Sentencing Counseling and Issues .....</b>	<b>69</b>
IX-3.1 Counseling Client Regarding Sentence and Probation Terms .....	69
IX-3.2 Monitoring Sentences with Call-Back Provisions .....	69
IX-3.3 Ensuring Client Receives Jail Time Credit .....	69
X. APPEAL AND POST-CONVICTION.....	70
<b>X-1 Direct Appeal .....</b>	<b>70</b>
X-1.1 When MSPD Represents on Appeal.....	70
X-1.2 Counseling Client Regarding Appellate Remedies .....	70
X-1.3 Perfecting Appeal Mandatory for Defendant Even if Not Representing on Appeal.....	70
<b>X-2 Post-Conviction .....</b>	<b>71</b>
X-2.1 Conduct of Defender and Staff—Cooperation with Post-Conviction Defender .....	71
X-2.2 Filing of Post-conviction Motion Not a Waiver of Confidentiality .....	71
X-2.3 Communication with Court or Prosecutor .....	71

XI. PROBATION VIOLATIONS .....	72
<b>XI-1 Investigation and Disposition of Probation Violations.....</b>	<b>72</b>
<b>XI-2 Representing Probationers outside Geographic Area of MSPD Office.....</b>	<b>72</b>

## I. GENERAL PRINCIPLES AND ETHICS

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### ***I-1 General Role and Duties of Defender***

#### **I-1.1 Duties of Defender**

- a) The Defender's duty is to fully protect and advance the client's interests and legal rights. The Defender has a duty of confidentiality and owes undivided loyalty to the client, uncompromised by conflicts of interest. The Defender should seek the lawful objectives of the client and should not substitute the Defender's judgment for that of the client in case decisions that are the responsibility of the client.
- b) Defender clients are entitled to zealous representation by trained advocates. The Defender should advocate for the client and must demand due process against governmental efforts to limit or take away the client's rights to life and liberty.
- c) The Defender should provide services to all clients in a professional and skilled manner that complies with the Rules of Professional Conduct, Chapter 600 RSMo., case law, applicable court rules defining duties of counsel and the rights of clients, and these Standards. The Defender should comply with the employee handbook and MSPD policies and procedures.

#### **I-1.2 Professional Relationships**

The Defender should seek to establish a relationship of trust and confidence with the client and should discuss the objectives of representation. The Defender should treat clients fairly, reasonably, and without discrimination. Similarly, the Defender should treat the client's family, MSPD staff, and other actors in the criminal legal system with courtesy and respect and engage them in a professional manner. The Defender should assist and mentor other Defenders as skills and abilities develop.

### ***I-2 General Ethical Obligations of Defender***

The Defender must know and adhere to all applicable ethical rules, opinions, and standards. Where appropriate, the Defender may consider a legal challenge to inappropriate rules and/or opinions. When in doubt about ethical issues, the Defender should seek guidance from other experienced Defenders, but should interpret any good faith ambiguities in a light most favorable to the client.

#### **I-2.1 Informal and Formal Advisory Ethical Opinions**

The Defender should consult with their District Defender if she wants to seek informal or formal advisory opinions from the Missouri Supreme Court Advisory Committee and/or Legal Ethics Counsel. When a District Defender receives a request to seek an informal or formal advisory opinion, the District Defender should consult with a Division Director before seeking the opinion. The purpose of this policy is to ensure that MSPD is aware of requests for opinions that may impact the operations of MSPD as a whole, and to permit an opportunity to resolve the issue and have input.

## **I-2.2 Bar Complaints**

Before filing a bar complaint against prosecutors, attorneys general, their assistants, other counsel, or judicial complaints against judges, the Defender should consult their District Defender and the Division Director. The purpose of this policy is to ensure that MSPD is aware of issues that may impact MSPD, and to permit an opportunity to resolve the issue and have input. The purpose is not to prevent or prohibit the reporting of professional misconduct, and should not be construed as such.

## ***I-3 Education, Training, and Experience of Defender***

### **I-3.1 Education and Training**

- a) To provide competent representation, the Defender must be familiar with Missouri law and criminal procedure, including changes and new developments.
- b) The Defender should participate in MSPD training programs, and meet the Missouri Supreme Court's Continuing Legal Education requirements.

### **I-3.2 Experience**

The Defender should have sufficient experience to provide competent representation for a particular case. Where appropriate, the Defender should consult with more experienced Defenders to acquire knowledge and familiarity with all facets of criminal representation.

## ***I-4 Appropriate Client Boundaries***

The Defender should maintain appropriate boundaries with clients and maintain professional objectivity. Some boundaries may be easy to recognize, and are governed by the Rules of Professional Conduct. Others are subtle but should nevertheless be maintained. When in doubt, the Defender should discuss appropriate boundaries with the District Defender. Boundary issues may include, but not be limited to:

- 1) Disclosure of personal information to the client.
- 2) Social relationships with the client.
- 3) Financial assistance to the client.
- 4) Physical contact with the client.

### **I-4.1 Policies of Secure Facilities**

- a) The Defender should comply with all policies at secure facilities, such as jails or detention centers, which may preclude providing the client with prohibited materials. Facility rules differ and the Defender should be familiar with them.
- b) The Defender should seek appropriate administrative or legal remedies when policies at secure facilities unreasonably burden the attorney-client relationship (e.g., restricting client access to reasonable case-related materials, limiting Defender visiting hours, recording of attorney phone calls, failure to provide a confidential meeting space).

#### **I-4.2 Posting Bond for Client Prohibited**

The Defender should comply with ethical and court rules which prohibit lawyers from paying bond for a client. Missouri Rule of Professional Conduct 4-1.8(e); Supreme Court Rule 33.17(d).

#### **I-4.3 Sexual Relationship with Client Prohibited**

The Defender shall not have a romantic or sexual relationship with a client or former client. *See* Rule 4-1.8.

#### **I-4.4 Transportation of Client and Witnesses Limited**

If Defenders or staff need to personally transport clients or witnesses in any vehicle, they should discuss with their District Defender and obtain express prior approval on a case-by-case basis.

### ***I-5 Delegation of Duties to Non-Attorney Staff***

#### **I-5.1 Responsibility for Staff Ethical Breaches**

The Defender is accountable and responsible for breaches of attorney ethical duties by non-attorney staff. *See* Missouri Rule of Professional Conduct 4-5.3.

#### **I-5.2 Supervision of Delegated Work**

The Defender may delegate tasks (such as drafting and investigation) to non-attorney staff, provided the Defender supervises the work and ensures the staff's conduct is in accord with the professional and ethical duties of the Defender. The Defender at all times remains ultimately responsible for the work performed and produced by non-attorney staff. Delegation should be subject to local office policies.

### ***I-6 Responding to Media Inquiries***

#### **I-6.1 Case Specific Media Inquiries and Outreach**

a) As a general rule, the Defender should return calls from the media about the client's case, even if the Defender is not able to comment because of the Rules of Professional Conduct relating to client confidentiality. Politely telling a reporter that the Defender is unable to comment is a perfectly acceptable response, and is usually more beneficial than failing to respond. The Defender may be able to comment on procedural information or speak on background, provided confidential information is not disclosed or the Rules of Professional Conduct violated. The Defender should obtain the client's consent prior to making any comment on the client's case, even if the comment is on only procedural or background information.

b) Rule 4-1.6 states that a lawyer may not reveal information relating to the representation of a client unless 1) the client gives informed consent or 2) the disclosure is impliedly authorized in order to carry out the representation. Rule 4-1.6 applies even after the litigation has concluded.

c) Where a Defender wishes to initiate contact with the media regarding a client's case, the Defender should comply with the Rules of Professional Conduct and should consult with the District Defender before initiating contact.

### **I-6.2 General Media Inquiries**

The Defender should refer media requests that are not case specific to the District Defender who may refer the request to a Division Director or the Director.

### **I-7 Punctuality in Court Appearances and Appointments**

The Defender should be prompt for all court appearances and appointments. If a delay is unavoidable, the Defender should take steps to minimize inconvenience to others, including the client, the court, and opposing counsel.

### ***I-8 Conflicts of Interest***

#### **I-8.1 Checking for Conflicts**

- a) The District Defender should establish procedures for identifying conflicts of interest. The Defender should use those procedures to review for and avoid conflicts with current and former clients. A client of one Defender in the Office is considered the client of every other Defender in the Office.
- b) Upon becoming aware of any actual or potential conflict of interest, the Defender should notify the District Defender or other supervisor, and take steps to ensure that clients or applicants for services whose interests conflict with those of the Defender or the Defender's client are promptly referred for representation to a conflict-free Defender, MSPD Office, or contract counsel in accordance with MSPD policy.

#### **I-8.2 Representing Client and Witness against the Client Prohibited**

No MSPD Office should simultaneously represent both a client and a witness against that client.

#### **I-8.3 Representing Multiple Co-Defendants Prohibited**

No MSPD Office should represent more than one of multiple co-defendants.

#### **I-8.4 Office Employee Personal Conflicts—Employee Becomes Witness, Victim, or Has Personal Stake**

If any employee of the Office is a victim or witness, has a personal stake in the outcome of any case against any client, or has a family member who is involved in the case, the employee should immediately inform the District Defender, who will determine whether a conflict exists.

### ***I-9 Representation of Persons outside Geographic MSPD Office Area***

Eligible applicants should not be denied representation in a matter solely because they are incarcerated or living outside the geographic jurisdiction of the MSPD Office that would be assigned to the case.

### ***I-10 Disposition of Detainers and Other Pending Charges***

- a) The Defender should represent eligible incarcerated persons against whom detainers are lodged or charges are pending. The Defender should assist in filing proper requests for disposition, or taking other appropriate legal steps to dispose of the charges. Where the Defender is representing an existing client and learns that the client has detainers or charges pending in other cases, the Defender should advise and assist the client in filing for disposition of those cases, too, where it will benefit the client.
- b) Persons incarcerated in state or federal prisons may have statutory rights, or other legal remedies available, to prompt disposition of pending charges. *See* Sec. 217.450 (inmates of Missouri prisons facing Missouri charges); Sec. 217.490 (interstate cases). Prompt disposition of pending charges is often important to give incarcerated persons the opportunity to receive the most favorable outcome. However, where delay is more advantageous to the client, the Defender should so advise the client. After fully informing the client, the Defender should abide by the client's decision whether to seek prompt disposition or delay.
- c) Where the Defender represents a client who is incarcerated in prison, the Defender should be familiar with detainer law and be alert to defense conduct which may waive the client's legal rights to prompt disposition of detainers. The Defender should seek to avoid waiver of the client's rights to prompt disposition and should advise the client of the consequences of requesting a change of judge and/or venue and the effect of filing for a continuance.

### ***I-11 Fugitive Complaints and Extradition***

The Defender should represent eligible persons wanted in other states in fugitive and extradition proceedings in Missouri.

#### **1-11.1 Counseling Client Regarding Extradition Law**

- a) The Defender should be familiar with the law pertaining to extradition, Chapter 548, and should investigate and advise the client on the consequences of contesting or waiving extradition, and should seek disposition in accordance with the client's goals. In many cases, the client may waive extradition. Those who do not waive may become the subject of fugitive complaints.
- b) The law authorizes an initial detention of ***up to*** 30 days and a single extension of ***up to*** 60 days or two court hearings; additional extensions are not available absent extraordinary circumstances. After initial detention and any authorized extension, the fugitive complaint must be dismissed unless the Missouri governor has issued an extradition warrant.

*Christopher v. Tozer*, 263 S.W. 2d 864 (Mo App. 1954). A governor's warrant may be challenged by writ of habeas corpus as set forth in Chapter 548.

### **1-11.2 Bonds in Extradition Cases**

- a) The Defender should investigate whether the client may post bond in the State seeking extradition and advise the client accordingly.
- b) Bond is authorized on the Missouri fugitive warrant, unless the offense is punishable by death or life imprisonment.

## ***I-12 Advising and Representing Suspects and Witnesses***

### **I-12.1 Representation of Suspects**

The Defender may be called upon to advise and represent suspects, witnesses, and complaining witnesses regarding their legal rights and obligations. An eligible person is entitled to MSPD services any time the right to counsel attaches. *See Sec. 600.042.4(5), RSMo.* The right to counsel is independent of any court action.

### **I-12.2 Legal Advice to Witnesses in Client's Case**

- a) The Defender should not provide legal advice to a witness, but should provide the witness with an opportunity to seek independent legal counsel. If the witness informs the Defender that they want to obtain legal advice the Defender should provide the witness with an opportunity to do so. If the witness chooses not to seek independent legal advice, the Defender may continue the interview. *See Missouri Rule of Professional Conduct 4-4.3.*
- b) Where there is reason to believe the witness may not be able to afford independent counsel but desires independent counsel, the Defender may give the witness an application, but should *not* make any indigence determination whatsoever. The Defender should provide the application to the District Defender who may consult with the Division Director or Case Contracting as to whether the applicant is indigent, and if so, how conflict free counsel will be obtained.
- c) It is a conflict and ethical violation for any attorney to be involved in the selection of counsel for a witness against that attorney's client. Under *no* circumstances should the Defender advise the witness about any legal rights or options the witness may have with regard to testimony against the Defender's client.

### **I-12.3 Independent Advice to or Representation of Witnesses Who May Incriminate Themselves**

- a) A witness has the right to counsel when being questioned by legal authorities about a matter that could lead to criminal prosecution. A Defender should be provided to eligible persons. The risk of incrimination can also arise in situations where, in the course of providing the testimony sought, the witness would also be describing illegal behavior in which the witness participated. Under those circumstances, a witness has a right to remain silent under the Fifth Amendment to the United States Constitution.

b) A Defender investigating a case on behalf of a defendant-client should not inform a witness that information the witness is providing may incriminate them. This is because the Defender's duty is to the defendant-client, not the witness. However, where the witness seeks legal advice from the Defender, the Defender should stop questioning the witness or discussing the case, and should advise the witness of the right to seek independent counsel. After providing such warning, the Defender is permitted to continue the interview if the witness does not seek independent counsel.

#### **I-12.4 Independent Advice and Representation of Witnesses Who Do Not Want to Testify**

Where the Defender is informed by a witness that the witness does not want to testify in the defendant-client's case, the Defender should immediately advise the witness that it would be a conflict of interest for the Defender to give the witness any legal advice concerning testimony, legal rights, or options, and advise the witness to consult independent counsel. *See I-12.3 for a description of procedures to follow when this situation arises.*

#### **I-12.5 Spousal Privilege**

- a) Sometimes a witness will have rights not to testify apart from the Fifth Amendment, e.g., spousal privilege. MSPD generally does not represent or advise witnesses where only a spousal privilege is concerned, because there is no constitutional right to counsel for such advice. The constitutional right to counsel applies only where the witness is at risk of adverse criminal consequences because of the witness's testimony.
- b) However, where conflict counsel is representing a witness who may be exposed to adverse criminal consequences, counsel may also discuss with the witness other privileges that may apply (such as spousal privilege), which the witness may choose to exercise in lieu of the Fifth Amendment.

#### **I-12.6 Representation of Witness by Conflict Defender – Immunity Proceedings**

- a) The conflict Defender who has been asked to consult with a witness must first ensure that the witness qualifies for MSPD services by obtaining a completed application, having the office determine if the witness is indigent, and determining if there is a reasonable likelihood that the witness may be facing adverse criminal consequences if the witness testifies in the underlying case, such that the matter is eligible for MSPD services.
- b) If all of the above conditions are met, the conflict Defender will undertake representation of the witness. Once representation has been undertaken, the conflict Defender should take whatever steps are necessary to accurately assess and advise the witness-client of the risk of adverse consequences to which the witness may be exposed by testifying, as well as the applicability of the right to invoke the Fifth Amendment. Counsel should also represent the witness before the court and in conversations with the prosecuting attorney concerning the witness's testimony in the underlying case.

c) The conflict Defender should be familiar with Missouri law regarding self-incrimination and immunity. Once a witness claims the privilege against self-incrimination, a rebuttable presumption arises that the witness's answer might tend to incriminate. *State ex rel. Harry Shapiro, Jr., Realty & Investment Co. v. Cloyd*, 615 S.W.2d 41, 45-46 (Mo. banc 1981). "This presumption can be rebutted by a demonstration *by the questioner* that the answer *cannot possibly* have a tendency to incriminate the witness." *State ex rel. Munn v. McKelvey*, 733 S.W.2d 765, 768 (Mo. banc 1987) (emphasis added).

d) In some circumstances, the prosecuting attorney may seek a grant of immunity under Section 491.205 RSMo. from a judge for a witness asserting the Fifth Amendment privilege. Where the conflict Defender represents a witness in such circumstances, the conflict Defender should ensure that the judge granting immunity defines "the subject matter of the inquiry," because that defines the scope of immunity. The Defender should take care to ensure that the witness's testimony is confined to the scope of immunity. The Defender should ensure that the immunity agreement is in writing, on the record, and sufficiently thorough to fully protect the witness. The Defender should also be familiar with the client's right to refuse the grant of immunity and the possible punishment for doing so.

### **I-12.7 Independence of Counsel for Witness**

a) The Defender representing a witness is and must be an independent and conflict-free Defender protecting the rights of the witness. Such Defender's duty is to the witness. The Defender for a witness should not be concerned about the impact the witness's action may have on another MSPD client's criminal case.

b) The Defender for a witness should not share information or coordinate strategy with counsel for an MSPD criminal client or with the prosecuting attorney except to the extent necessary and appropriate to protect the rights of the witness-client.

## **I-13 Client File Policies**

### **I-13.1 Client Files – General Policies**

a) The client file includes any electronic file, paper file, discovery and police reports, pleadings, work product, depositions, and any investigative information produced or obtained during the course of the representation.

b) The client file is the property of the client. The file must be provided to the client in a timely fashion upon request, whether during or after the representation, subject to exceptions set forth below.

### **I-13.2 Client Files – Maintenance of Files**

a) Missouri Rules of Professional Conduct require an attorney to maintain a client's original file for a minimum of six years (for files where representation was completed after July 1, 2016) or 10 years (for files where representation was completed before July 1, 2016) after the representation is concluded, unless the attorney and client agree to a different disposition of the file. Rule 4-1.22.

- b) Either the original file or an exact copy of the file should be maintained at MSPD at least until the statute of limitations has expired for attorney malpractice actions.
- c) Rule 4-1.22 prohibits destruction of the file if a lawyer knows or reasonably should know that (1) a legal malpractice claim is pending related to the representation; (2) a criminal or other government investigation is pending relating to the representation; (3) a complaint is pending under Missouri Rules of Professional Conduct relating to the representation; or (4) other litigation is pending related to the representation.
- d) Rule 4-1.22 prohibits destruction of items in the file with intrinsic value. Because items of intrinsic value can never be destroyed, the Defender should avoid taking custody of such items. In the rare circumstance where the Defender does take custody of such items, the items should be promptly returned to the client as soon as the need for such items is concluded.
- e) MSPD must keep the original application, notice of fees, lien, or similar documents necessary for MSPD to later show that the client was eligible for services, and for MSPD to effectuate its required fees or liens. Copies of any fee request or lien should be provided to the client.
- f) In providing an original client file, or a copy thereof, the Defender should remove from the file jury questionnaires and any information that would allow contacting of jurors. This policy is intended to prevent accusations of tampering with jurors. However, such juror information should be preserved by the Defender with the client's remaining internal MSPD file, and should be made available to any subsequent counsel for the client for use in state or federal appellate or post-conviction litigation of any type.
- g) In providing an original client file, or a copy thereof, the Defender should remove from the file any information that is subject to a court's protective order. To make such information easily identifiable to others, the Defender handling a case when a protective order is entered should clearly mark the information in the file as subject to such order, preferably by placing it in a clearly marked envelope labeled "subject to protective order." This will ensure that the information will not be disclosed inadvertently by later persons who handle the file. MSPD staff must know what information in the file is subject to a court protective order, and should comply with the order. The information subject to protective order should be preserved by MSPD in the client's remaining internal MSPD file, and should be made available to any subsequent counsel for the client for use in state or federal appellate or post-conviction litigation of any type.
- h) In providing an original client file, or a copy thereof, the Defender should remove from the file any information that cannot be given to a client due to statute or court rule. The Defender should be familiar with statutes and court rules that limit distribution of information to clients. Section 545.950 restricts distribution of visual or audio recordings or photographs of a minor who is the victim of a sexual offense under Chapter 566. Such information should be preserved by MSPD in the client's remaining internal MSPD file, and should be made available to any subsequent counsel for the client to use in state or federal appellate or post-conviction litigation of any type.

i) Discovery received pursuant to Rule 25 marked "For Lawyer Only" may not be provided to the defendant. The discovery marked "For Lawyer Only" should be preserved and may be provided to subsequent counsel.

#### **I-13.3 Client Files – Requested by Client**

- a) Where a client requests the original file, the client must be informed that this constitutes a different disposition than MSPD keeping the file for ten years under Rule 4-1.22, and the client must be advised whether MSPD will retain a copy of the file. If MSPD will not retain a copy, the client should be so advised and will be cautioned to keep the file in a safe place, since MSPD will never be able to provide copies.
- b) The Defender should obtain a signed and dated receipt showing that the file was provided to the client. The receipt should be archived in the client's remaining paper and electronic files.
- c) Because the file belongs to the client, the Defender should not charge any fee for providing the client with the original file. The Defender may charge a reasonable fee for providing the client with copies of the original file, or copies made from copies of the file.

#### **I-13.4 Client Files – Released to Third Parties at Client's Request**

The client may request that the file be released to a third party, such as a family member or attorney, rather than directly to the client. The Defender should release the client file, or a copy thereof, to a third party only upon the verified, written consent of the client. The Defender should obtain a signed and dated receipt from the designated third party showing the file was released to the third party. The receipt should be archived in the client's remaining paper and electronic files.

#### **I-13.5 Client Files – Documenting File Requests**

The exact disposition of the file, including who it was given to and when, must be recorded in MSPD archiving system because MSPD routinely receives requests from former clients for files. It is critical that MSPD be able to track exactly what happened to a file, even decades after a case is closed. Questions about documentation of disposition of a file should be directed to file archivist officials in the State Office.

#### **I-13.6 Altering Client's File**

Under no circumstances should any MSPD employee alter the contents of a client's file(s), including any electronic file(s), with the intent to distort the record of the client's representation.

#### **I-13.7 Prosecutor Access to Client File Prohibited**

- a) The Trial Defender should never give prosecutors access to client files absent a court order or subpoena requiring disclosure of the client's files. The Defender should seek to

preserve attorney-client confidentiality in the client's file to the maximum extent permitted by law.

- b) The Trial Defender should not give prosecutors access to client files in post-conviction actions under Rules 24.035 and 29.15, or other similar post-conviction proceedings, but should leave all decisions as to discoverable information from the client file to the discretion of the Post-conviction Defender.
- c) Post-conviction Defenders should refer to MSPD Standards for Appellate/Post-conviction Representation for guidance on disposition of the client's file in post-conviction cases.

#### **I-13.8 Post-conviction Defender Access to Client File**

Upon request, the Trial Defender should promptly give the Appellate/Post-conviction Defender the original client file(s), but the Trial Defender should continue to be able to review the file at mutually convenient times and places.

#### ***I-14 Continuing Obligation of Representation—Successor Counsel***

The Defender's representational obligation continues throughout the pendency of the client's case, or until and unless another attorney is assigned to the case or files an appearance in the case. The Defender should fully cooperate with any successor counsel. A trial division felony or misdemeanor case is considered closed at sentencing. A subsequent request for representation on a probation violation for that felony or misdemeanor is a new case requiring a new application, indigence determination, and due process order.

#### ***I-15 Standby, Hybrid, and Advisory Counsel***

##### **I-15.1 Standby, Hybrid, or Advisory Role Prohibited by Rule**

- a) The terms "standby," "hybrid," and "advisory counsel" are defined as attorneys who are appointed by the court to consult with or assist a defendant, appellant, or movant in the preparation or presentation of evidence or legal argument in any court or tribunal where that defendant, appellant, or movant has waived the right to counsel or asserted his right to full or partial self-representation.
- b) A person seeking standby, hybrid, or advisory counsel is not eligible for MSPD services. *See 18 CSR 10-2.010.* A Defender should not serve as hybrid, standby or advisory counsel in any matter. *See 18 CSR 10-2.010(3).* The purpose of this policy is to ensure that limited MSPD resources are not diverted from persons who want and need MSPD representation to persons who do not want MPSD representation.

##### **I-15.2 Objection to Appointment as Standby, Hybrid, or Advisory Counsel**

The Defender should object to appointment as standby, hybrid, or advisory counsel on grounds that 18 CSR 10-2.010 precludes such appointment, and that criminal defendants are not constitutionally or statutorily entitled to a public defender for standby, hybrid, or advisory counsel. The Defender should inform the court that if the court wishes to appoint

standby counsel, it should appoint private counsel in lieu of MSPD. The Defender should then consult with the District Defender to determine what legal action MSPD should take in response to appointment.

#### **I-15.3 Duty When Appointed as Standby, Hybrid, or Advisory Counsel**

Where a court orders a Defender to serve as standby, hybrid, or advisory counsel, after taking the steps outlined in Section 1-15.2, the Defender should notify the court in writing that although the Defender will make himself or herself available to answer a defendant's (or appellant's) questions at trial (or on appeal), the Defender will conduct no investigation or preparation of the case. A letter to the court filed with the clerk, or other similar notice in the court file, will satisfy this duty. The Defender should also give the defendant (appellant) a copy of this writing, and should make clear to the defendant (appellant) the Defender's limited role in the case.

#### **I-15.4 Defendant's Right to Revoke Request for Standby, Hybrid, or Advisory Counsel**

A person may revoke a request for standby, hybrid or advisory counsel at any time, and invoke the right to counsel. In such circumstances, the Defender should fully represent the person as counsel, if the person otherwise qualifies for services.

### **I-16 Defender Workload**

A Defender's workload must be controlled so that each case may be handled diligently, competently, and effectively. *See State ex rel. Missouri Public Defender Com'n v. Waters*, 370 S.W.3d 592, 607 (Mo. banc 2012); Missouri Rules of Professional Conduct 4-1.1, 4-1.3 and 4-1.4. A Defender should not represent a client if the representation involves a concurrent conflict of interest, which exists if there is a significant risk that the representation of one or more clients will be materially limited by the Defender's responsibilities to another client. *See Waters*, 370 S.W.3d at 607-08; Rule 4-1.7(a) (2). A conflict of interest is created when a Defender is compelled by an excessive caseload to choose between the rights of the various indigent defendants he or she is representing. *Waters*, 370 S.W.3d at 608. A Defender's acceptance of a new case(s) violates Rule 4-1.7 if it compromises the Defender's ability to provide diligent, competent, and effective representation. *Id.* at 607.

#### **I-16.1 MSPD Procedures When Workload Creates Conflict between Clients**

- a) A Defender should not represent a client if such representation will result in violation of the Rules of Professional Conduct, and should take all appropriate steps and legal actions, including consultation with MSPD management, to avoid such representation. While taking appropriate legal steps and actions, the Defender must continue to represent the client to the best of the Defender's ability. *See Sec. 600.062 RSMo.*, Rule 4-1.16(a) (1) and 4-1.16(c).
- b) Where a Defender believes that the Defender's caseload is precluding diligent, competent and effective representation, the Defender should first inform the District Defender and request that the District Defender remedy the caseload. The District

Defender should determine whether the caseload is excessive. If the District Defender determines that the caseload is not excessive, the District Defender should so inform the Defender. If the Defender believes the determination as to excessive caseload is not reasonable, the Defender should inform the Division Director or Director of the Defender's belief that the Defender has an excessive caseload. The Division Director or Director should independently examine the caseload and determine whether it is excessive. If the Division Director or Director determine that the caseload is not excessive, the Director(s) should inform the Defender. A Defender should comply with a reasonable determination that a caseload is not excessive. *See Rule 4-5.2(b); ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 06-441.*

c) When a District Defender determines that a Defender's caseload is excessive, the District Defender should seek to remedy the excess through case reassignment within the Office. If case reassignment within the Office is not sufficient to remedy the caseload, the District Defender should inform the Division Director or Director of the excessive caseload. If the Division Director or Director agree that the caseload is excessive, they should take appropriate steps and legal actions to remedy the caseload, which may include consultation with the Public Defender Commission.

d) The Division Director or Director should inform the Defender as to how MSPD intends to remedy the caseload. The Defender should allow the Division Director and Director a reasonable opportunity and time to remedy the caseload, including exhaustion of all appropriate legal remedies available to MSPD. *See, e.g., Sec. 600.062 RSMo.*

## **II. CLIENT CONTACT, COMMUNICATION, AND CARE**

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### ***II-1 Quality and Content of Client Communication***

The Defender should attempt to establish rapport with the client and should always treat the client respectfully.

#### **II-1.1 Barriers to Communication**

- a) Where the Defender is unable to communicate with the client because of language, the Defender should seek an interpreter.
- b) The Defender should be alert to cultural issues which may impact the client's understanding of issues.
- c) The Defender should be alert to a client's inability to communicate or assist due to incompetency, and should take appropriate steps to investigate and litigate competency. *See Mental Health, Section III of these Standards.*

#### **II-1.2 Initial Counseling**

As soon as practicable in the attorney-client relationship, the Defender should explain to the client the following:

- 1) Attorney-client privilege and confidentiality.

- 2) The right to remain silent under the Fifth Amendment and the crucial need to exercise this right and not to discuss the case with anyone except counsel, unless counsel advises otherwise.
- 3) The decisions that must be made by the client (what plea to enter, whether to waive a jury, whether to testify, and whether to appeal).
- 4) The decisions that ultimately will be made by the Defender after consultation with the client, consideration of the client's input, and after investigation is complete (trial strategy, including what motions to file, which witnesses to call, what questions to ask, what objections to make, and what other evidence to present).
- 5) The nature of the charge(s) pending against the client and any lesser offenses.
- 6) The range of punishment for the charge(s).

#### **II-1.3 Pretrial Release Questions**

If the client is detained, the Defender should obtain information to assist in obtaining pretrial release under the most favorable conditions possible, including information about the following:

- 1) The client's residence and length of residency.
- 2) The client's family, including names, addresses, and phone numbers of family members.
- 3) The client's employment history and financial resources.
- 4) The client's mental health.
- 5) The client's record of prior criminal arrests and/or convictions and present probation and parole status.
- 6) The client's record of appearances at court proceedings, including explanation of any failures to appear.
- 7) The client's place of birth, citizenship, and immigration status. (The Defender should seek to minimize the deportation or re-entry consequences for the client).

#### **II-1.4 Initial Interview**

a) The Defender should obtain the following information from a client, which should include information necessary for representation in the case. That information should be available to counsel and/or subsequent counsel either on a client interview form or in the physical or electronic file for the client. The information includes but is not limited to:

- 1) The client's address, phone number, and other relevant contact information.
- 2) The client's family, including the names, addresses, and phone numbers of family members.

- 3) The client's place of birth, citizenship, and immigration status; *See Section IV Immigration.*
- 4) The client's education history and literacy.
- 5) The client's employment history and financial resources.
- 6) The client's mental health and medical history, including any health insurance and Social Security disability.
- 7) The client's substance abuse history.
- 8) The client's military history.
- 9) The client's record of prior criminal arrests and/or convictions.
- 10) The client's present probation or parole status.
- 11) The client's current charges in any other jurisdiction.
- 12) The general circumstances of the client's alleged offense, such as arrest, police questioning, search and seizure information, alibi witnesses or witnesses to the alleged offense, etc.

b) The Defender should exercise caution in eliciting the client's version of the alleged offense, prior to reviewing discovery.

#### **II-1.5 Notice of Court Dates and Hearings**

The client is entitled to notice of court dates and hearings, and to know what to expect at a court appearance. The Defender should:

- 1) Have a confidential in-person or phone consultation with the client significantly in advance of all substantive court appearances.
- 2) Explain the nature of the upcoming hearing and give the client an opportunity to discuss the upcoming hearing with the Defender and prepare for the hearing.
- 3) Inform the client of what testimony to expect at the upcoming hearing. If the client will testify at the hearing, the Defender should discuss with the client the questions that will be asked on direct examination and assist the client with preparation for the State's cross-examination.

#### **II-1.6 Communication Regarding Motions**

- a) The client is entitled to notice of motions filed in the case, and to have input into the content of those motions. Giving a client input regarding a motion helps ensure that the motion is factually accurate, and ensures that the motion meets the client's goals.
- b) The Defender should discuss substantive motions with the client prior to filing the motion. Where practicable, the Defender should present and review the motion with the client prior to filing.
- c) Where time is of the essence or it benefits the client to file a motion expeditiously, such as a bond reduction motion, the Defender may file a motion prior to the client's review.

## **II-1.7 Providing Documents to Client**

a) The Defender should provide the client with significant documents obtained or prepared during the course of a case unless circumstances dictate otherwise, including a client request to not have documents sent either to home or incarceration facility. Significant documents should be provided within a reasonable time, usually at the next client contact. Significant documents include, but are not limited to

- 1) The charging documents.
- 2) The discovery provided by the State, unless it is labeled Lawyer Only.
- 3) Forensic reports.
- 4) Pretrial motions filed by the State or Defender.
- 5) Deposition transcripts.

b) Some clients may not want to receive documents and the Defender should honor that request. For example, a client may not want to receive discovery in jail due to the nature of the charge. At other times a client may not want mail sent to his home with a MSPD sender address.

c) The duty to provide documents exists independently and separately from a request by a client to provide the "file," and is a continuing duty of the Defender in order to keep the client timely informed of all significant developments in the case.

## **II-2 Frequency and Manner of Client Contact**

The Defender should make every effort to ensure prompt and meaningful initial consultation with the client in an appropriate, confidential setting.

### **II-2.1 Initial Contact by Defender before Preliminary Hearing**

The initial consultation should occur before the Defender conducts a preliminary hearing. The Defender should personally conduct the consultation and should not delegate it to non-attorney staff.

### **II-2.2 Initial Engagement Letters**

The Defender should give or send to the client an initial engagement letter in accordance with local office policy. At a minimum, the letter should:

- 1) Inform the client that he or she qualifies for services.
- 2) Inform the client of the specific Defender who will be representing the client and how the client can contact the Defender.
- 3) Warn the client not to talk to law enforcement (police) or anyone else about the case, including family, friends, or fellow inmates.
- 4) Inform the client that if law enforcement (police) should contact the client, the client should tell them the Defender is representing the client; that the Defender has advised the client not to speak with police or anyone else; and that the client asserts the right to silence and to counsel.

- 5) Warn the client not to discuss the case by mail, telephone, or email from the jail or prison, since letters, phone calls and emails are monitored and taped, and will be used against the client.

#### **II-2.3 Initial Contact with Incarcerated Clients**

If the client is in custody, initial in-person contact should occur within seven days after the Defender knows of assignment to the case or in compliance with local office visitation policies.

#### **II-2.4 Monthly Contact with Incarcerated Clients**

- a) If a client is in custody within the geographic area of the Defender's District Area Office, an assigned Defender should have in-person contact with the client a minimum of once every 30 days or in compliance with local office visitation policies.
- b) If a client is in custody, but not within the geographic area of the Defender's District Area Office, an assigned Defender should seek to have in-person contact with the client as often as practicable; but if unable to have an in-person contact, should have written, telephone, or video-link communication with the client a minimum of once every 30 days or in compliance with local office visitation policies.
- c) The Defender should seek judicial relief from impediments to Defender contact with incarcerated clients, including but not limited to, jail or prison practices or policies which unreasonably impede attorney-client communication and the incarceration of clients outside the geographic area of the Defender's District Area Office

#### **II-2.5 Initial Contact with Clients Not in Custody**

If the client is not in custody, within seven days, or in compliance with local office visitation policies, after the Defender knows of assignment to the case, the Defender should contact the client to schedule an appointment with the client for an initial consultation.

#### **II-2.6 Monthly Contact with Clients Not in Custody**

- a) If the client is not in custody, the Defender should have contact with the client a minimum of once every 30 days, or in compliance with local office visitation policies. The Defender contact may be in person, electronic, written, or by telephone or video-link communication. In-person contact is preferred for communicating significant case developments.
- b) The Defender is not required to send monthly letters to an address for which letters are returned as "undeliverable," or make monthly phone calls to a phone number that is no longer in service; in such circumstances, the Defender should conduct reasonable investigation to discover the client's new address, phone number, or other contact information so that monthly communication may occur.

## **II-2.7 Available Appointment Times**

The Defender should be available for scheduled client appointments at mutually convenient times and locations and in accordance with Office policy.

## ***II-3 Contact with Significant Others***

### **II-3.1 Client Consent to Contact with Significant Others**

a) Client family members and significant others provide a support network and are often integral to the client's decision-making. They can be sources of valuable information, character or fact witnesses, and resources for the client. Where the client consents, the Defender should reasonably communicate with family and significant others about the case, as appropriate.

b) In communicating with family members and significant others, the Defender should:

- 1) Obtain the client's consent before discussing the client's case.
- 2) Even if consent is given, the Defender should refrain from disclosing client confidences where harm to the client may result.
- 3) Explain to the client the potential waiver of confidentiality before including third parties in any client conference.
- 4) Explain to third party conference participants that some topics and questions may be off-limits due to laws and rules pertaining to confidentiality, and that they may not be able to participate in all conferences.
- 5) Discuss with client a family member who can be a point of contact for practical issues during representation; i.e. court clothing, court date notices, etc.

c) Contact with family members concerning early representation issues, such as bond and mental or medical health issues may need to occur prior to contact with the client. In those cases, the Defender should limit information provided to information that is publicly available.

### **II-3.2 Client Does Not Consent to Contact with Significant Others**

Where the client does not consent to the Defender disclosing information to family and significant others, the Defender should abide by that decision, without disclosing that the client withheld consent. Documentation of that client decision should be in the client electronic file so that requests for information from family members to MSPD staff other than the assigned Defender will be handled consistently with the client's wishes.

## ***II-4 Resources for Favorable Disposition***

a) Defenders provide legal services through the client-centered representation model. To provide effective representation under this model, the Defender should be aware of both the causes and consequences of involvement with the criminal legal system. The client's legal problems often stem from underlying, unaddressed issues such as substance abuse,

mental illness, lack of educational opportunities, and systematic racism. In addition, the client will be subject to a range of collateral consequences after conviction and even short-term incarceration, such as unemployment and homelessness. Addressing the client's underlying, non-legal needs benefits the client and the client's case. Receipt of social services and participation in community-based programs can make the difference in obtaining pretrial release, negotiating a favorable plea agreement, securing problem-solving alternative sentencing, and as mitigating evidence for the court.

b) In order to obtain the best disposition for the client, the Defender should seek to identify the causes and consequences of the client's criminal charges as early as the initial client interview and assessment.

c) Where necessary to obtain a favorable disposition, such as probation for the client, the Defender should investigate the social service needs of the client, and advise and refer the client to service providers, as appropriate. The Defender should be aware of available community resources when negotiating with the prosecutor and preparing for sentencing.

d) The Defender should be familiar with and establish relationships with local service providers, which may include legal aid offices, substance abuse treatment programs, housing authorities, mental health clinics, food banks, area career centers and adult education providers, and job training programs.

e) The Defender should never advocate to the State or court for client involvement in services without the client's consent.

### ***II-5 Incarcerated Client Care***

The Defender should alert the incarcerating authority, and where appropriate seek a court order, concerning significant special needs of the incarcerated client (health-related matters, etc.).

### ***II-6 Collateral and Ancillary Representation***

#### **II-6.1 Permissible Scope of Representation**

a) The Defender should stay within the scope of representation which MSPD is authorized to provide. Even though the client may benefit from collateral or ancillary representation, the Defender may not be authorized by statute or other authority to provide such representation (e.g., modifying child support or waiver of arrearages in a child support case; representing a client in a driver's license case to contest suspension or revocation or to gain reinstatement; cases involving child custody or termination of parental rights; and representation in municipal court, protective order proceedings, civil forfeiture, and guardianship proceedings to aid an incompetent client).

b) Even though the Defender cannot provide such representation, the Defender should be alert to instances where the client could benefit from taking action in a non-criminal proceeding, and encourage the client to consider such action. The Defender should stop short of giving legal advice to the client regarding such actions, and make clear to the client

that the Defender is not authorized to represent the client outside the limited scope of the criminal proceeding.

c) To the extent that participation in related non-criminal proceedings could result in admissions that could be used against the client in the criminal prosecution, the Defender should advise the client of the potential impact on the defense of the criminal case. In order to protect the client's interest, it may be necessary to have contact with third parties in these collateral matters.

### **II-6.2 Referral to Private Attorneys, Agencies, Public Administrator**

a) The Defender may refer the client to private attorneys or agencies which may represent the client in collateral or ancillary matters. However, the Defender should make clear that MSPD does not make official recommendations or endorsements of private attorneys or agencies, and that the client is free to hire whomever the client may choose. The Defender should make clear that any referral to private counsel is the Defender's personal suggestion and not an official recommendation or referral by MSPD. The Defender should not provide referrals to private attorneys or agencies, unless the Defender has reason to believe the attorneys or agencies are qualified to handle the matters referred. The Defender should not accept any compensation for a referral for a client.

b) Where the client is incompetent, the Defender may seek assistance from the local public administrator, volunteer private attorneys, or other appropriate resources, to ensure that the client obtains an appropriate guardian when doing so will result in dismissal of charges or other favorable disposition.

## ***II-7 Appropriate Grooming and Clothing of Client and Witnesses for Court Appearances***

### **II-7.1 Client Clothing and Grooming for Court Appearances**

a) The Defender should seek to ensure that the client has an appropriate appearance at trial, and to the extent possible, other significant court appearances. For non-incarcerated clients, the Defender should advise the client on appropriate clothing and grooming, e.g., haircuts and shaves. The Defender should not assume that the client will know what clothing and grooming are appropriate, and should specifically recommend to the client what should or should not be worn.

b) For incarcerated clients, the Defender should ensure that the client is permitted to wear appropriate street clothing, has enough appropriate clothing for trial, and that the client has access to appropriate grooming.

c) Where the client lacks proper clothing, the Defender should not be required to purchase clothing for the client from personal funds, but should seek to obtain clothing from the client's family or charitable organizations, or from maintenance of donated clothes in an MSPD Office "client clothes closet."

## **II-7.2 Witness Clothing and Grooming for Testimony**

To the extent possible, the Defender should also seek to ensure key defense witnesses have an appropriate appearance for court.

## **II-8 Client's Failure to Appear**

The Defender should act in the best interest of the client when the client fails to appear in court. Various ethical rules may be implicated, including rules about privilege, confidentiality, and candor to the court.

### **II-8.1 Confidentiality**

- a) The reasons for the client's inability to appear are confidential. The Defender may disclose the reasons to benefit the client, to prevent a warrant from issuing, or to obtain a continuance.
- b) The Defender should not disclose certain information, including the current whereabouts of the client; the last known address and prior addresses of the client; phone numbers or electronic contact information; and any information that may be used for purposes of arresting the client or prosecuting the client for failure to appear. The Defender should not disclose that the client was notified of the court date or that the Defender has lost contact with the client.

### **II-8.2 Candor with Court**

The Defender has an obligation of candor to the court, and should not mislead or lie to the court. Sometimes the best course of action may be to provide the court no information. If specifically asked by the court, the best reply may be to inform the court that under confidentiality rules, the Defender cannot disclose the information. If the court persists in requesting confidential information, the Defender should consider pursuing appropriate remedies, such as consultation with the District Defender, Legal Ethics Counsel, or appellate remedies.

### **II-8.3 Attempts to Contact Client Regarding Failure to Appear**

Where the client fails to appear, the Defender should take reasonable steps to contact the client and ascertain if there are valid reasons for failure to appear, or if the client may still be able to appear, even if late.

### **II-8.4 Steps to Notify Client and Facilitate Release on Bond if Capias Does Issue**

If the court orders a capias warrant, the Defender should attempt to notify the client of the warrant, advise the client of the consequences of the warrant, and where possible, seek a disposition that avoids arrest of the client or allows release on bond.

### III. MENTAL HEALTH

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#### ***III-1 Mental Health Overview***

Many of our clients have serious mental health issues that impact their lives and their ability to navigate the criminal court system. The intersection of mental health and the law is quite complex and decisions in this area may have a significant impact on the client, their case and their life. Many clients need evaluations by mental health professionals for competence, criminal responsibility, mitigation etc. Because of the complexity and ramifications of the choices in this area, attorneys are expected to consult with their District Defenders before requesting a mental health evaluation so that the District Defender can ensure that the client and the needs of the case are met in the best and least risky manner available. If the District Defender does not have sufficient experience in this area or has questions about the best course in any individual case, the District Defender is expected to include the Division Director in the case consultation to help develop a plan of action that most protects this vulnerable group of clients and ensures that the course of action best meets the needs of the case and client.

**Private Expert Evaluations v. Court Ordered DMH Evaluations:** Because any court ordered evaluation that DMH conducts will result in a report shared with the State and the Court that may be used against the client in this and future cases in a number of different situations, it is often in the client's interest to have evaluations performed by private evaluators rather than Court Ordered DMH evaluations. This, however, is not always the case. Because any private evaluation goes through the request process, both District Defender and Division Director receive information before this course of action moves forward. Court ordered competency and responsibility evaluations, however, do not receive this automatic review. Court ordered mental health evaluations, therefore, should not be requested unless the attorney first consults with his/her District Defender and if the District Defender does not have sufficient skill and experience in this area, he/she should include the Division Director to consult and develop the best strategy in light of potential risks and benefits of available options.

#### ***III-1.1 Investigation and Records Collection Prior to Engaging Expert***

- a) The Defender should investigate the client's mental health where it appears the client may have a legally significant mental disease or defect impacting competency, need for immediate and/or continued hospitalization, waiver of rights, responsibility (NGRI), diminished capacity, or sentencing.

- b) Where possible, the Defender should first gather and review all social history records on the client, including school, medical, psychological, psychiatric, military, social security, jail and prison records. Such records will better inform the Defender about the need for an expert evaluation, and if an evaluation is pursued, will inform the Defender as to the type of expert to retain. Such records will also assist the expert in reaching an opinion that is accurate and can be supported.
- c) The Defender should also interview family members and significant others to obtain social history information and specific behaviors relevant to determining whether the client has mental health issues that may impact his/her journey through the criminal court system.

### **III-1.2 Type of Evaluation, Private vs. Court Ordered Department of Mental Health Evaluation**

- a) Where circumstances warrant an evaluation by a mental health expert, the defender will need to determine whether to request a Court Ordered evaluation in which a report will be generated that goes to the Prosecutor and Judge regardless of the outcome, and may be able to be used against the client in a variety of ways or whether to seek approval and funding for a private evaluation, in compliance with MSPD expense request procedures and expert retention policies. The Defender should not seek an evaluation by the Department of Mental Health under Chapter 552, without first consulting with his/her District Defender. Numerous factors support this policy, including that the client's statements to a State examiner will be admissible where the defense requested the State examination. *See State v. Worthington*, 8 S.W.3d 83, 93 (Mo. banc 2000).
- b) For additional information on how to balance the interests and make an informed decision about whether to seek a court ordered non-confidential evaluation or a private evaluation, the District Defender and Defender should review and be familiar with: Mental Health Evaluation Factors Memo, 2-2016 in the MSPD Policy, GFR database.
- b) The Defender in consultation with the District Defender should determine the best option given the nature of the client and his/her case considering risks and benefits with the options available. If the District Defender does not have sufficient knowledge, experience and expertise in this area, the District Defender is expected to reach out to the Division Director.
- c) Circumstances warranting a mental health evaluation include:
  - 1) **Mental Status Evaluations:** The Defender may seek an expert to conduct a mental status evaluation in circumstances in which it is close in time to the alleged crime, it is a serious offense in which a mental disease or defect defense may be the best available option and the client appears to present with significant mental health symptoms.

- a. A private expert will be needed for this. There is no right to this exam by court order under the statutes and it is too soon in the case to have much in the way of discovery so protecting the client from unnecessary 5<sup>th</sup> amendment right waivers is important.
- 2) **Competence:** The Defender should seek a competency evaluation where the Defender believes the client may lack competence. The Defender has a duty to investigate competency. An incompetent client is legally unable to provide consent and make decisions; counsel must act on the client's behalf. *See Rule of Professional Conduct 4-1.14.*
  - a. This evaluation may be a private evaluation or court ordered pursuant to RSMo. 552.020 et. Seq. The decision about whether to pursue a Court Ordered evaluation or a private evaluation should be made by the Defender in consultation with the District Defender. If the District Defender does not have sufficient knowledge, experience and expertise in this area, the District Defender is expected to reach out to the Division Director for guidance.
- 3) **Need for immediate or continuing hospitalization:** The defender may need the expert to address the client's need for immediate and/or continued hospitalization. Even before a court makes a finding on competence, there may be situations in which the client needs immediate hospitalization. Additionally, once a court determines a client is incompetent and orders the client into DMH custody, it could be months before a bed is available. If the client is not doing well in the jail due to his/her illness, he/she may be hospitalized far more quickly if the expert doing the competency evaluation indicates a need for immediate hospitalization, even pending resolution of the competency issue, and the reasons that the immediate hospitalization is needed.
  - a. Both a Court Ordered DMH evaluation pursuant to 552.020.3(4) &(5) or a private evaluation can address these issues. We may be able to get a private evaluator to conduct the evaluation more quickly than a DMH evaluator. The decision about whether to pursue a Court Ordered evaluation or a private evaluation should be made by the Defender in consultation with the District Defender. If the District Defender does not have sufficient knowledge, experience and expertise in this area, the District Defender should reach out to the Division Director for guidance.

4) **Responsibility and Mitigation Evaluations:** The Defender may seek an evaluation for a competent client for Mental Disease or Defect Excluding Responsibility, a/k/a NGRI (See, 552.030 et. seq.); Mental Disease or Defect Negating a Culpable Mental State, a/k/a diminished capacity (See, 552.015.2(8); sentencing mitigation; or other appropriate reasons. In such circumstances, the Defender should fully discuss the benefits and risks with the client, at a time when the client is competent.

- a. **NGRI:** Pursuant to RSMo. 552.030 et. Seq. the Court may order an evaluation for NGRI that DMH will then conduct. They will discuss the facts of the case with the client. They will write a report regardless of whether it is helpful to the client, neutral or even harmful. This report goes to the State and the Court and may be able to be used against the client in the current case and future cases. For this reason, it is usually the best practice to at least start with a private evaluation. The decision about whether to pursue a Court Ordered evaluation or a private evaluation should be made by the Defender in consultation with the District Defender. If the District Defender does not have sufficient knowledge, experience and expertise in this area, the District Defender is expected to reach out to the Division Director for guidance.
- b. **Diminished Capacity and Mitigation:** An evaluation for Diminished Capacity and/or mitigation must be done privately using the e request process. There is no right to a Court Ordered evaluation for these issues. See, *Caruthers v. Wexler-Horn*, 592 S.W.3d 328 (Mo.Banc 2019)

### **III-1.3 Procedures for Private Evaluation**

- a) The Defender should inform the private evaluator of the scope of the evaluation and any specific questions the evaluator needs to answer (e.g., competency, responsibility, mitigation, etc.) and instruct the evaluator to consult with the Defender before preparing any written report.
- b) The Defender should inform the evaluator that if competency is an issue (in addition to responsibility or other mental health issues), the evaluator should evaluate only for competency first. If the evaluator believes the client is not competent, the evaluator should stop the evaluation and not evaluate for responsibility (or other mental health issues) until the issue of competency has been resolved in Court. This is because an evaluator should not interview an incompetent client about the offense. Where an evaluator believes the client is incompetent, the Defender should litigate competency or obtain an otherwise

favorable outcome for the client due to incompetency, before continuing with an evaluation for responsibility (or other mental health issues).

**III-1.4 Whether to Request Expert Report (only applies with private evaluations—if it's a court ordered DMH evaluation there will be a report that goes to the parties and the court)**

- a) Upon completion of an evaluation, the Defender should speak with the evaluator and if the evaluator's opinion will not help the client's defense, the Defender should instruct the evaluator not to write a report. Any written or electronic communications with the expert may be subject to discovery.
- b) If the evaluator's opinion will help the client's defense, the Defender may instruct the evaluator to write a report, but should instruct the evaluator to provide the report solely to the Defender for review, discussion, and appropriate disclosures based on the discovery rules. Once a report has been created, the Defender will have to disclose it if the Defender will use the expert in the case. Additionally, the Defender may even have to disclose the report in certain circumstances even if the Defender elects not to use the expert, so the Defender should be confident that the report will be helpful before requesting it.

***III-2 Court-Ordered Evaluations for Competency***

**III-2.1 Limiting Court-Ordered Evaluations to Competency**

- a) The Defender should object to court or state initiated, court-ordered mental evaluations by the Department of Mental Health, unless it is after the Defender conducts sufficient investigation and makes a determination regarding risks and benefits or has conducted and noticed up an evaluation from a private examiner. If the court wants to order a State evaluation, and the Defender is not confident that it will be in the client's interest, the Defender should request the opportunity to do a private evaluation first if the defender believes this is better for the case and client.
- b) Where a court orders a State mental evaluation over the Defender's objection, the Defender should ensure that it is limited to competency, unless the client's mental status at the time of the alleged offense has been put at issue by the filing of a notice of intent to rely on mental disease or defect as a defense. *See State ex rel. Thurman v. Pratte*, 324 S.W.3d 501 (Mo. App. E.D. 2010); *State ex. Rel. Proctor v. Bryson*, 100 S.W.3d 775 (Mo.Banc 2003).
- c) The State is entitled to a second opinion following the Defender's private evaluation. The Defender should ensure this second evaluation is limited to competency, unless and until the defense files notice of intent to rely on an NGRI defense.

**III-2.2 Objections to Involuntary Medication**

When a client is committed to the Department of Mental Health for competency restoration, the Defender should be aware that DMH may seek to involuntarily medicate the client. This may interfere with the ability to present a defense in some circumstances. The defender should be aware of this and when necessary to protect the client and his/her

case, move to prohibit involuntary medication of the client, unless and until specifically authorized by the court after a hearing. *See Sell v. United States*, 539 U.S. 166 (2003) (right to reject medical treatment, including treatment with antipsychotic drugs, constitutionally protected but not absolute).

### ***III-3 NGRI or Not Guilty by Reason of Mental Disease or Defect Defense***

#### **III-3.1 Consequences of Pursuing NGRI Defense**

A finding that a client is not guilty because the client lacked mental responsibility at the time of the offense is commonly known as NGRI (“not guilty by reason of insanity”). An NGRI finding may carry with it a lifetime commitment to the Department of Mental Health, subject to conditional or unconditional release by a court. Except in homicide cases, data shows that confinement in the Department of Mental Health after an NGRI finding is usually longer than imprisonment after a finding of guilt.

#### **III-3.2 Procedure for Pursuing NGRI Defense**

Because of the severe consequences of an NGRI finding, the Defender should not pursue an NGRI defense in any case where the charge is less than a Class B felony unless the Defender has discussed this matter with the District Defender and Division Director. An NGRI defense should rarely be pursued if the charge is less than a class B felony. This restriction does not apply if the Defender is pursuing only a diminished capacity defense where the client does not face commitment to the Department of Mental Health if the defense is successful. This restriction does not apply to competency evaluations.

#### **III-3.3 Filing Notice of NGRI Defense**

The Defender should file a notice of intent to rely on mental disease or defect as a defense only after an evaluation has been completed by a qualified mental health specialist, the expert notifies the Defender that the defense is available to the client and the client consents to the filing of the notice. It is almost always best practice to have a private evaluation done at least in the first instance to investigate the availability of this defense before making a determination that will subject the client to a court ordered evaluation that will not be confidential. There are, however, timing requirements for the filing of this notice in the statute—See., 552.030.2, with which the defender needs to be familiar. If the defender has questions about this, he/she should seek the guidance of his/her District Defender or Division Director.

### ***III-4 Conditional and Unconditional Release***

Any Court or person seeking representation in a conditional or unconditional release proceeding following a commitment to DMH pursuant to 552.030, should be referred to the CDU District Defender. These referrals go to CDU for a determination of eligibility and representation if eligible and indigent. 552.040.3.

### ***III-5 Involuntary Civil Commitment under Sec. 632.415***

The Defender should not provide representation in involuntary civil commitment proceedings under Sec. 632.415. If appointed, the Defender should notify the District Defender, Division Director and seek to withdraw from such representation.

## **IV. IMMIGRATION**

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### ***IV-1 Birthplace Inquiry during Initial Client Conference***

In every initial client conference, the Defender should inquire as to the birthplace of the client. If the client was not born in the United States, the Defender should further investigate whether the client is a citizen.

### ***IV-2 Investigation of Consequences of Immigration Status***

If the client was born outside of the United States, the Defender should investigate the client's immigration status and the consequences that a finding of guilt or sentence will have on that status. The Defender should be familiar with whether a charge is grounds for deportation or inadmissibility (ability to lawfully re-enter U.S.), or if the charge precludes U.S. citizenship, or results in loss of lawful immigration status. To that end, the Defender should be well-versed in the immigration consequences of a conviction or should seek consultation with another attorney who is well-versed in immigration consequences, whether within MSPD or through outside consultation.

### ***IV-3 Advice to Non-citizen Client***

The Defender should specifically advise the non-citizen client of the direct and collateral immigration consequences of a plea including the possibility of deportation, later inability to reenter the U.S., or denial of citizenship. The Defender should advise a non-citizen client of the consequences should the client seek to return to the U.S.

### ***IV-4 Duty to Seek Client's Goals***

In some circumstances, avoiding immigration consequences is more important to the non-citizen client than spending time in jail or other criminal sanctions. The Defender should make every effort to understand and achieve the priorities of the client after advising the client of the potential immigration consequences.

## **V. INITIAL COURT APPEARANCES**

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### ***V-1 Initial Appearance***

#### ***V-1.1 Protection of Client's Rights***

Where the Defender represents the client at initial appearance, the Defender should ensure that the client does not waive any significant rights.

### **V-1.2 Opportunity for Early Discovery**

The Defender should be attentive to any opportunity for discovery which might present itself at initial appearance.

### **V-1.3 Opportunity to Request Pretrial Release**

The Defender should seek to obtain the client's pretrial release on the terms most favorable to the client at initial appearance.

## ***V-2 Bail Hearing***

### **V-2.1 Favorable Bail Conditions to Be Sought at Earliest Opportunity**

Unless the client directs otherwise, the Defender should attempt at the earliest opportunity to secure the client's pretrial release under conditions most favorable to the client.

### **V-2.2 Familiarity with Bail Laws and Local Practices**

The Defender should be familiar with bail laws, including the legal standards which the court may consider in setting the conditions of release, and any bail amount, if appropriate, including the right to seek appellate relief.

## ***V-3 Preliminary Hearing***

### **V-3.1 Purpose of Preliminary Hearing**

The preliminary hearing provides the opportunity to test the adequacy of the State's case, and the opportunity to discover specific information about the case, including its strengths and weaknesses.

### **V-3.2 Timing of Preliminary Hearing**

- a) The Defender should seek a prompt preliminary hearing unless sound reasons exist for a different strategy.
- b) If the client is in custody, the Defender should make every effort to secure the preliminary hearing within 30 days, unless there are compelling, client-oriented reasons to do otherwise.

### **V-3.3 Preparation for Preliminary Hearing**

The Defender should research or already know the pertinent aspects of the law, particularly the elements of all pending charge(s). The Defender should obtain all available information from the client and from prosecution authorities, including early discovery (if available), and should investigate, as fully as possible, the facts underlying the charge(s).

### **V-3.4 Decision Whether to Waive Preliminary Hearing**

- a) The presumption is to have the preliminary hearing.
- b) Strategic reasons may dictate otherwise and each case must be evaluated on its own merits in deciding whether to have or waive a preliminary hearing. The Defender should

discuss the potential benefits and risks with the client prior to waiver of the preliminary hearing in each case.

- 1) Potential benefits of a preliminary hearing include dismissal of the State's case, and the ability to conduct preliminary examination of State's witnesses.
- 2) Potential risks of a preliminary hearing include preservation of the testimony of a witness who may be unavailable at trial, implicating the client's confrontation rights.
- 3) The Defender may recommend waiver to preserve an offer or for other reasons that benefit the client.

#### **V-3.5 Special Considerations for Murder and Serious Felony Cases**

- a) The presumption is to waive a preliminary hearing in any serious felony case where the preliminary hearing is being recorded and the Defender has reason to believe a key state's witness may later become unavailable.
- b) In a murder case which potentially may be charged as a capital offense, the Defender should waive a preliminary hearing, following consultation with the client.
- c) The Defender should contact the Capital Division Director for guidance prior to conducting a preliminary hearing in a potential capital case. The presumption is that a preliminary hearing in those circumstances should not occur.
- d) The decision as to whether or not to waive a preliminary hearing is the client's decision.

#### **V-3.6 Recording Preliminary Hearing**

- a) The Defender should consider the potential benefits and risks to the client of recording a preliminary hearing.
- b) When the Defender elects not to record the hearing, the Defender should consider whether waiver is appropriate if it is apparent the court or the prosecutor intends to record the hearing.
- c) Where the Defender decides to record a preliminary hearing, the Defender should ensure that an adequate record is made, preferably through use of an official court reporter or in such a manner to be preserved for possible use at trial for impeachment purposes.

#### **V-3.7 Conduct of Preliminary Hearing**

- a) At the outset, the Defender should consider the likelihood of charges being dismissed at the hearing. This will dictate the Defender's strategy at the hearing. The Defender usually will not present affirmative evidence at the preliminary hearing to avoid disclosing the defense case or subjecting defense witnesses to cross-examination at this stage.
- b) The Defender should not present the client's testimony unless there is compelling reason to do so. In such circumstances, the Defender should consult with the District Defender prior to the preliminary hearing.
- c) The Defender should seek sequestration of State's witnesses where appropriate.

- d) The Defender should consider questioning State's witnesses until the court terminates the questioning. This will allow the Defender to later argue that the defense did not have full and fair cross-examination, in the event that the State seeks to admit the preliminary hearing testimony at trial in lieu of an unavailable witness.
- e) The Defender should be prepared to argue that the State failed to meet its burden to show probable cause.

## VI. CASE PREPARATION

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### ***VI-1 Client File Contents***

#### **VI-1.1 Contents**

The Defender should keep and maintain a thorough, organized physical (paper) file and/or electronic file on each client. The file, whether physical or electronic, is the property of the client. Recommended contents include, but are not limited to:

- 1) The charging document.
- 2) The date the client was arrested and charged.
- 3) The client's custody status.
- 4) The client's application.
- 5) An initial interview form, with the date of initial interview.
- 6) The date of the initial conference with the Defender.
- 7) The nature, substance, and dates of subsequent client contacts.
- 8) Motions, hearings, and conferences regarding bail.
- 9) The nature, substance, and dates of discussions and negotiations with opposing counsel or the Court.
- 10) Investigation or request for investigation and the dates thereof.
- 11) Request for Discovery, and the date thereof.
- 12) Discovery and the date received.
- 13) Pretrial motions.
- 14) Documentation of any plea offers, and communication of offers to the client.
- 15) All notes by the Defender.

#### **VI-1.2 Manner of Documentation**

The Defender should comply with Office policy regarding the manner of documentation.

### ***VI-2 Early Discovery***

#### **VI-2.1 Informal Discovery from Prosecutor**

The Defender should take every opportunity for the earliest possible discovery.

## **VI-2.2 Copies of Court Records, Search Warrants and Returns, etc.**

The Defender should examine and request copies of all relevant and available court records, which may include probable cause statements, arrest warrants, search warrants, and returns of service on those warrants.

## **VI-2.3 Preservation of Evidence**

The Defender should seek preservation and/or discovery of any evidence likely to become unavailable unless special measures are taken.

## ***VI-3 Protecting the Client during the Early Stages of the Proceeding***

### **VI-3.1 Prosecutor Requests for Non-Testimonial Evidence Such as Handwriting or Physical Specimens**

The Defender should be familiar with the law governing the State's power to require the client to provide non-testimonial evidence, such as handwriting samples and physical specimens. The Defender should request an evidentiary hearing on the necessity of such discovery; and the Defender or other defense representative should be present during any disclosure ordered by the court under Missouri Supreme Court Rule 25.06.

### **VI-3.2 Investigative Subpoenas and Search Warrants during Discovery Phase**

The Defender should be alert to and object to the prosecution's improper use of investigative subpoenas and search warrants in the discovery phase of the case. Improper use includes issuance of investigative subpoenas after charges have been filed, issuance of subpoenas for non-existent court dates and issuance of subpoena duces tecum for trial.

### **VI-3.3 Rights to Silence and Against Self-Incrimination**

The Defender should take appropriate steps to protect the client's right to silence and against self-incrimination.

### **VI-3.4 Victim's Rights Issues**

At times conflicts arise between constitutional and statutory crime victim rights, and the client's constitutional, statutory, and rule-based rights. Defenders should seek to litigate the prejudicial impact of crime victim provisions, including but not limited to:

- 1) Attempts to limit the client's confrontation rights.
- 2) Inappropriate use of victim provisions to delay setting or reduction of bond. For example, crime victims have a right to be informed of court dates only *upon request*, except in the case of dangerous felonies, first-degree murder, and voluntary manslaughter. *See Mo. Const., Art. I, Sec. 32; Sec. 595.209, RSMo.*
- 3) Inappropriate prosecutorial or judicial deference to victim wishes, such as plea agreements.
- 4) Giving favored positions in the courtroom to complaining witnesses and supporters.

- 5) Allowing non-endorsed persons to testify at sentencing hearings.

## ***VI-4 Discovery***

### **VI-4.1 Written Discovery Requests Required**

The Defender should timely file written discovery requests in every case under Supreme Court Rule 25.03. This procedure should be followed even if prosecution authorities have already provided discovery, as such procedure will legally safeguard against deliberate or accidental failures by prosecution authorities to give complete discovery. The State's duty to make disclosure is ongoing.

### **VI-4.2 Additional Discovery Pursuant to Rule 25.04**

Where appropriate, the Defender should use the procedures under Supreme Court Rule 25.04 to obtain discovery not covered under Supreme Court Rule 25.03.

### **VI-4.3 Measures to Compel Response to Discovery**

To the extent that the State does not appropriately respond to discovery requests, the Defender should first seek to resolve the matter informally through consultation with the prosecutor. If informal efforts are not successful, the Defender should file motions to compel discovery and/or seek sanctions against the State pursuant to Supreme Court Rule 25.18.

### **VI-4.4 Duty to Provide Discovery to State Only Upon Formal Request**

- a) The Defender has duties to make timely disclosures to the State under Supreme Court Rules 25.02, 25.05, 25.06, 25.07 and 25.08. The duty to make disclosure under the Rules is ongoing.
- b) Where the State has not made timely requests for discovery, the Defender should make strategic decisions, in consultation with client, as to whether to provide discovery to the State.

## ***VI-5 Investigation***

### **VI-5.1 Duty to Investigate**

The Defender should conduct, or secure the resources to conduct, an independent case review and investigation as promptly as possible. The Defender should, regardless of any admission of guilt, determine whether the charge(s) and disposition are factually and legally correct and ensure the client is aware of all potential defenses. Investigation should include both the innocence/guilt phase of the case and sentencing advocacy. The Defender should take the necessary steps to conduct a penalty phase investigation even if the Defender believes the client will be found not guilty or that the charges against the client will otherwise be dismissed.

## **VI-5.2 Preservation of Evidence**

Even before the Defender has obtained information concerning the State's version of the case, the Defender should seek preservation and/or discovery of evidence (such as visible injuries, surveillance video, phone records, etc.) likely to become unavailable unless special measures are taken. Where appropriate, the Defender should seek court orders for preservation of evidence such as 911 tapes, body cam video and in car dash cam videos, etc.

## **VI-5.3 Preliminary Considerations**

From the outset, the Defender should develop a preliminary theory of the case and develop investigative strategies for advancing appropriate defenses. The Defender should consider:

- 1) The elements of the charged offense(s).
- 2) Available ordinary and affirmative defenses.
- 3) Lesser-included offenses.
- 4) Defects in the charging document, constitutional or otherwise, such as statute of limitations or double jeopardy.
- 5) Police and state documents.
- 6) *Doggett* and speedy trial defenses.

## **VI-5.4 Clear and Timely Requests for Investigation**

If an investigator is used, the Defender should make clear, timely requests for investigation and where there is an initial theory of defense should use the theory to give purpose and direction to the investigation. Investigation requests should be included in the file according to local office policy.

## **VI-5.5 Case-specific Investigation**

Investigation should include, where applicable, the following:

- 1) Interviews and/or depositions of witnesses.
  - a. The Defender should consider whether to interview and/or depose potential witnesses, both favorable and adverse.
  - b. The Defender should assign specific investigation requests related to the witness interviews.
  - c. The Defender should avoid interviewing adverse witnesses without an Investigator present to avoid becoming a witness in the client's case. An interview of an adverse witness should be done in a manner that permits the Defender to impeach the witness with statements made during the interview. The Defender should be aware that written memoranda, notes, and recordings of the interview may be discoverable. The Defender must decide whether the witness's statements should be documented or recorded and should direct the Investigator accordingly.

- d. Favorable witnesses should not be deposed unless the Defender can articulate a reason to do so.
- e. The Defender should consider, when interviewing or deposing a child witness, if a 491 statement, that could be harmful to the client, is being created.
- f. All depositions require supervisor approval for the expenditure of funds per MSPD policy.

- 2) Recordings or essential transcripts of any previous hearings in the case or related cases.
- 3) Records in the possession of third parties such as medical, psychological, and school records. The Defender should seek a release to obtain necessary confidential information about the client. The Defender should seek a release, subpoena duces tecum for deposition or court order to obtain confidential information about the co-defendant(s), or witnesses in the possession of third parties.
- 4) Physical evidence. The Defender should examine physical evidence and determine whether independent analysis or testing is appropriate.
- 5) Documentation from State Experts. The Defender should obtain bench notes or other documentation supporting any lab reports and the certifications of the lab conducting the lab work for the State.
- 6) The crime scene. The Defender should view the scene of the alleged offense as soon as possible. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, lighting conditions, and seasonal changes). The Defender should direct the Investigator to photograph, video tape, measure, or create diagrams or charts of the scene as necessary. The Defender should obtain a court order, if necessary, to visit the crime scene.
- 7) Expert assistance. The Defender should consult with or retain experts and other professionals regarding issues related to the trial and/or sentencing. The Defender should follow MSPD procedures for retaining experts. The Defender should adequately investigate the expert's credentials before retaining any expert.

#### **VI-5.6 Dealing with Physical Evidence Not in the State's Possession**

Taking custody of evidence may create legal and ethical problems for the Defender.

- a) The Defender should, to the greatest extent possible, avoid taking custody of any physical evidence, whether found by the Defender (or the Defender's agents, such as investigators), or brought to the Defender by a client or other person.

b) The Defender should not disturb or tamper with evidence at a crime scene. Evidence should be left "in place" and "as is." If evidence must be collected, the Defender should consult the District Defender on how to collect the evidence. Collecting physical evidence from a crime scene may involve consulting law enforcement or the State to have them collect the evidence. The Defender may photograph or videotape the evidence to benefit the client, as long as the evidence is left "in place" and "as is."

c) In rare circumstances where the Defender does take possession of physical evidence, the Defender should establish and document a proper chain of custody for the evidence, so that it may be admissible in court. An investigator or other appropriate staff member should be designated as a custodian for the evidence, and the evidence should be stored in a secure location with proper labeling and safeguards to ensure a proper chain of custody. At the conclusion of a case, the physical evidence should be kept with the case file, or returned to its legal owner where legally appropriate.

#### **VI-5.7 Investigation Prerequisite to Recommendation of a Plea**

The Defender should not recommend acceptance of a plea unless appropriate investigation and study of the case has been completed and discussed with the client, including:

- 1) An analysis of the controlling law and the evidence likely to be introduced at trial to determine if the State has a factually submissible case against the defendant.
- 2) An in-depth interview of the client as soon as possible after receipt of discovery and following a review of that discovery with the client. This interview may cover some of the same topics as the initial interview.
- 3) Fact checking of police and state documents.

#### **VI-6 Theory of the Case**

The Defender should develop a defense theory of the case. The Defender should also anticipate the State's theory, as well as what witnesses are likely to be called by the State in its case-in-chief and in rebuttal. The Defender should develop strategy for cross-examination of the State's witnesses and strategy for presentation of the defense case, both to highlight weaknesses in the State's case and to advance the defense theory. The Defender should reassess the defense theory as events warrant.

#### **VI-7 Pre-trial Motion Practice**

The Defender should file any motions that are strategically and legally appropriate. The decision to file motions should be made after conducting sufficient investigation and researching relevant law. The Defender should be familiar with Missouri statutes and rules, as well as local court rules governing the procedure and time limits for litigating pretrial motions. Before filing a pretrial motion, the Defender should consider any

potential adverse effects which the client might suffer as a result of the motion, such as the State's withdrawal of a plea offer. *See Section II-1.6 Communication Regarding Motions.*

### **VI-7.1 Pre-trial Motions That Should Be Considered in All Cases**

Where appropriate, the Defender should file motions to address the following:

- 1) Unreasonable searches and seizures.
- 2) Illegally obtained statements from the client.
- 3) Suggestive identification procedures.
- 4) Denial of the client's right to speedy trial, and request for a speedy trial.
- 5) Constitutionality of the statute under which the client is charged.
- 6) Insufficiency of the charging document.
- 7) Change of judge.
- 8) Change of venue.
- 9) Motion to dismiss, including speedy trial and *Doggett* issues.
- 10) Requests for severance from or joinder with other defendant or charges.
- 11) Bill of particulars.
- 12) Motion for continuance to give counsel time to adequately prepare.
- 13) Motions *in limine* to bring to the trial court's attention problematic issues which might arise at trial.
- 14) Motion to ensure proper trial or courtroom procedures (e.g., no visible client shackling, client clothing, etc.).
- 15) Challenges to restitution or other costs to the client.
- 16) Disposition of detainees.

### **VI-7.2 Requirement that Motions Cite Both State and Federal Constitution**

To preserve the client's right to federal review of claims, the Defender should ensure that all motions expressly cite applicable federal constitutional provisions as a basis for the motions. All motions should also cite relevant state constitutional provisions, especially where the state constitution may provide greater or different protections than the federal constitution.

### **VI-7.3 Preparing Pretrial Motions**

When preparing a pretrial motion, the Defender should:

- 1) Conduct investigation and discovery necessary to advance the claim.
- 2) Research the appropriate statutory, constitutional and case law pertaining to the claim, applicable local rules and hearing date information.

- 3) Understand which party has the burden of going forward, which party has the burden of proof and what the standard of proof is for the motion.
- 4) Subpoena pertinent evidence and witnesses.
- 5) Consider the benefits versus the costs of having the client testify. The client's testimony in some instances may be admissible in the State's case-in-chief; in others it may only be admissible for impeachment.
- 6) Submit to the court written suggestions of law in support of the positions espoused in the motion, where appropriate.
- 7) Consider seeking interlocutory relief after an adverse pretrial ruling on the motion, where appropriate.
- 8) Renew the motion at trial.

#### **VI-7.4 Manner of Arguing Pretrial Motions**

- a) The Defender should litigate all pretrial motions on the record at an appropriate hearing, and should obtain an on-the-record ruling on pretrial motions from the court.
- b) The Defender should avoid taking motions to suppress "with the case." Such motions should be litigated before trial, and a ruling on the motions obtained before trial.
- c) The Defender should avoid litigating pretrial motions the morning of trial.

## **VII. GUILTY PLEAS**

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### ***VII-1 Client with No Prior Felony Pleas or Convictions***

#### **VII-1.1 Negative Consequences of Felony Conviction**

Becoming a felon is a watershed event. A felony carries lifelong disabilities. It is often a crippling impediment to employment and impacts not only the individual but his or her dependents. Consequences may include losing rights to vote, hold public office, serve on a jury, possess a firearm, hold professional licenses, and to obtain public housing, educational aid, student loans and other public benefits; imposition of harsher penalties for future offenses; immigration consequences; offender registration requirements; and loss of driving privileges.

#### **VII-1.2 Case Review Prior to Plea that Would Result in Client Becoming a Felon**

If the charge may result in the client's first felony disposition:

- 1) The Defender should clearly document that the case is a first felony in the client's paper and electronic file.
- 2) The Defender should conduct and document a thorough case analysis, an investigation of factual allegations, defenses and applicable case law, comprehensive client consultation, necessary pretrial litigation and alternatives to felony conviction were pursued prior to a plea, in accordance with these standards.

- 3) The Defender should document that he conveyed the collateral consequences of becoming a felon to the client.

## ***VII-2 Conduct of Plea Negotiations***

### **VII-2.1 Negotiations Not to Be Initiated Without Client Consent**

The Defender should not initiate plea negotiations without discussing with the client whether the client wishes to initiate such negotiations.

### **VII-2.2 Purpose of Negotiations to Achieve Client's Goals**

The Defender should attempt to achieve the client's goals in the plea negotiations.

### **VII-2.3 Duty to Timely Convey Offers**

The Defender should keep the client informed of the status of plea negotiations, and timely convey to the client all plea offers made by the prosecutor throughout the case.

### **VII-2.4 Duty to Document Plea Negotiations**

The Defender should document plea negotiations, offers, and plea discussions with the client in the client's file.

## ***VII-3 Discussions with Client Regarding Plea Negotiations***

### **VII-3.1 Advisory Role of Defender**

- a) The Defender should make clear that the ultimate decision to enter a guilty plea must be made by the client.
- b) The Defender should discuss the direct and collateral consequences of any negotiated plea agreement with the client.
- c) After discovery, investigation, and client interviews, the Defender should candidly explain the strengths and weaknesses of the cases for the State and defense, the availability of State witnesses, the concessions and benefits which are subject to negotiation, and the possible consequences of a conviction.
- d) Collateral consequences of any conviction may include losing rights to vote, hold public office, serve on a jury, possess a firearm, hold professional licenses or other employment, and obtain public housing, educational aid, student loans or other public benefits; imposition of harsher penalties for future offenses; immigration consequences; offender registration requirements; and loss of driving privileges.

### **VII-3.2 Admission of Guilt Not Sufficient Reason to Recommend Offer**

The Defender should not advise a client to plead guilty merely because the client admits guilt to the Defender, or merely because of a favorable disposition offer. Rather, the Defender must believe that the complete circumstances of the case warrant such advice.

### **VII-3.3 Undue Influence or Coercion Improper Even When Defender Believes a Different Decision in Client's Best Interests**

- a) After discovery, investigation, and client interviews, where the Defender believes that the client's desire to either plead guilty or go to trial is not in the client's best interests, the Defender should counsel the client as to why the Defender believes the other option is in the client's best interest.
- b) However, in attempting to persuade the client, the Defender should not attempt to unduly influence or coerce the client into pleading guilty by means such as overstating the likelihood of conviction or the potential consequences of conviction, nor threatening to withdraw from representation should the client refuse to plead guilty. If the client wishes to plead guilty, the Defender should not attempt to unduly influence or coerce the client into going to trial by overstating the likely benefits of trial. If the Defender's efforts to persuade the client to change position are unsuccessful, the Defender should honor the client's decision.

### **VII-4 Continuing Duty to Prepare**

The Defender should continue to prepare the case in the same manner as if it is proceeding to trial on the merits, even though plea negotiations are ongoing.

### **VII-5 Prerequisites of Guilty Pleas**

Where the client decides to accept a plea offer, before the client pleads guilty, the Defender should be satisfied of the following:

- 1) That the client admits guilt, or that the client believes there is a substantial likelihood of conviction at trial and that it is in the client's best interests to plead guilty rather than face the perils of trial (*North Carolina v. Alford*).
- 2) That the client understands all aspects of the plea agreement, and understands all consequences of a guilty plea, including the costs of court fees, restitution, and jail board bills.
- 3) That the client has been advised whether the Defender believes the State could make a case against the client at trial.
- 4) That a guilty plea is voluntary, intelligent, and with full understanding of the nature of the charge.
- 5) That there is a factual basis for the guilty plea.
- 6) That the client understands the rights being waived, including the rights to trial by jury, to assistance of counsel at trial, to compulsory process, to confrontation of witnesses, to testify and the privilege against self-incrimination, the State's burden of proof beyond a reasonable doubt, and the right to direct appeal of a jury or judge verdict.

- 7) That the client understands the consequences of conviction, including collateral consequences.

#### ***VII-6 Advice Regarding Parole Eligibility***

- a) The Defender should advise the client that parole eligibility and release are determined by the Department of Corrections, and that the client may be incarcerated the entire duration of the sentence.
- b) The Defender must advise the client of statutory conditions concerning parole eligibility, such as the 85% requirement for dangerous felonies.
- c) In discussing potential parole release, the Defender should exercise caution in suggesting when the client might be paroled, as this is subject to change. The Defender should not make promises about parole.

#### ***VII-7 Investigating Alternatives to Incarceration***

The Defender should investigate, prior to the guilty plea, the client's eligibility for any treatment programs or other alternative sentencing programs that avoid incarceration.

#### ***VII-8 Attorney Withdrawal Where Inadequate Time to Prepare Before Guilty Plea***

- a) All lawyers have a duty to convey plea offers, but also have a duty to provide competent representation. Where the client wishes to plead guilty before adequate investigation is conducted, the Defender should make every effort to persuade the client to wait so the Defender may provide competent representation.
- b) Should the client choose to accept a felony plea offer before giving the Defender an opportunity to provide competent representation, the Defender should consider whether the Defender should move to withdraw and explain why. A client who chooses to proceed without competent counsel is effectively choosing to proceed *pro se*. The Defender should not be placed in the position of providing incompetent representation.
- c) Should the judge deny the Defender's request to withdraw and allow the client to proceed to plead guilty with "representation" by the Defender, the Defender should make a record that the Defender has not provided competent representation as required by the Professional Rules of Conduct.

### **VIII. TRIAL**

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#### ***VIII-1 General Trial Preparation***

The Defender should take all steps necessary before trial for complete discovery, investigation, and legal research. This preparation should include:

- 1) Review of all reports and information supplied by the State, all information provided by the client, and all materials obtained from the court, including transcripts of prior proceedings in this case or in related cases, such as cases of co-defendants.

- 2) Location of, interviews with, and service of subpoenas upon all potential helpful witnesses. Even cooperative witnesses should be under subpoena.
- 3) Consideration of whether depositions should be conducted of witnesses.
- 4) Examination of all potential real, documentary, and electronic/digital evidence.
- 5) Service of subpoenas duces tecum on the custodians of evidence necessary for trial.
- 6) Arrangement for defense experts on evidentiary issues which require the expert services.
- 7) Preparation of demonstrative evidence, such as photographs, charts, maps, diagrams, or other visual aids for the fact-finder in understanding the defense case.
- 8) Research of all law pertinent to issues in the case, with attention given to finding evidentiary problems in the anticipated cases for the State and defense, and to exploiting the evidentiary weaknesses in the State's case and shoring up weaknesses in the defense case.
- 9) Visiting the crime scene, where appropriate.
- 10) Attending related trials, such as those of co-defendants, where appropriate.
- 11) Organizing the materials into an effective organizational scheme for use at trial.

### ***VIII-2 Trial Checklist and Organization***

The Defender should prepare a checklist to prepare for and use at trial to ensure the Defender's trial materials are organized and readily accessible. A particular form of organization is not required by these Standards, but is left to individual choice or local office policy. At a minimum, the Defender preparing for trial should have organized in a trial file or notebook the following items:

- 1) Returns for subpoenas of all Defense Witnesses.
- 2) Returns for subpoenas for all helpful physical or documentary evidence and a plan for laying the foundation for that evidence.
- 3) A copy of the notice and the affidavit supporting admission of any business records.
- 4) Copies of all special notices for introduction of evidence (e.g., rape shield, mental defense, and alibi).
- 5) Transcripts of prior proceedings in this case or related proceedings of each witness organized and prepared/indexed by the Defender to readily impeach each witness.

- 6) Transcripts of any video or audio statements made by each witness in the case, along with the video or audio, organized and prepared/indexed by the Defender to readily impeach each witness. Where appropriate, or if required by local court rule, the Defender should have the audio or video professionally transcribed to allow easier use at trial.
- 7) Photographs, charts, maps, diagrams, or other visual aids (both demonstrative and evidentiary) with a plan for laying the foundation for admission and response to anticipated objections, already marked and organized for use in trial in accordance with local rules and practices.
- 8) At trial, a Defender should use an exhibit list or chart to document what exhibits were admitted or not. *See* Section VIII-14.5 Preserving Exhibits.
- 9) Pretrial motions, the court's trial orders, and identification of those motions that must be renewed at trial.
- 10) A plan for offers of proof for anticipated denial of defense evidence.
- 11) Investigation reports.
- 12) Juror list and standard juror questionnaires, along with investigation of jurors, including Case.net, social media, etc.
- 13) *Voir dire* topics, plans, and/or predominantly open-ended questions tailored to the specific case.
- 14) An outline or draft of opening statement.
- 15) A complete set of discovery as it was received from the prosecutor for reference if a discovery dispute arises at trial.
- 16) Relevant discovery organized and prepared by the Defender in a manner to readily impeach each witness.
- 17) Cross-examination plans for State witnesses indexed to prior statements in areas of likely impeachment.
- 18) List of Defendant's witnesses in order of planned testimony.
- 19) Direct examination plans for all defense witnesses, including prior statements.
- 20) Reports from all defense experts along with the expert's CV and any relevant articles or materials relied on by the expert.
- 21) Proposed jury instructions, with Notes on Use and supporting case citations, and a list of objections to the State's instructions and/or prepared alternatives.
- 22) Motions for judgment of acquittal after the State's case and after the entire case, with necessary copies to be filed during trial.

- 23) Copies of all relevant statutes and cases for anticipated legal arguments (at both innocence/guilt phase, penalty phase, and during jury instruction conference) and any aids or checklists for constitutionalizing objections.
- 24) Outline or draft of closing argument.
- 25) If jury sentencing: outline or draft of sentencing opening, cross-examination plans for State witnesses indexed to prior statements in areas of likely impeachment, direct examination plans for all defense witnesses, and outline or draft of closing.

#### ***VIII-3 Client's Waiver of Right to Jury Trial and Advice Regarding Bench Trial***

- a) The decision whether to waive the right to a jury trial rests solely with the client. The Defender should fully advise the client of the advantages and disadvantages of waiving the right to a jury trial, including the Judge's discretion in accepting the client's waiver.
- b) The Defender should exercise great caution before advising a jury waiver, and should only so advise if the Defender believes such a decision is sound in light of the facts of the case, the availability of and likely responses by State's witnesses, and available data or observation concerning the particular judge's fact-finding and sentencing decisions.
- c) Before waiving a jury, the Defender should advise the client that a bench trial severely limits issues that can be raised on appeal.

#### ***VIII-4 Invoking the Rule for Sequestration of Witnesses***

The Defender should seek sequestration of all witnesses, including the complaining witness, at the earliest opportunity at trial, unless tactical considerations dictate otherwise.

#### ***VIII-5 Stipulations***

- a) Before the Defender enters into any stipulations with the State, the Defender should weigh the advantages and disadvantages of such stipulations. This is particularly true when the facts to which the parties are stipulating are necessary elements of the State's case. Stipulations regarding the elements of the crime should be done only with great caution.
- b) The Defender should stipulate to matters only when there is a clear, articulable benefit to the client in doing so.

#### ***VIII-6 Voir Dire and Jury Selection***

##### ***VIII-6.1 Preparation for Voir Dire***

- a) The Defender should be familiar with the law of *voir dire*, including the number of peremptory challenges allowed to the parties and the extent of proper examination by both the State and the defense and the qualifications to be a juror.

- b) The Defender should ask *voir dire* questions which address the issues of the case and ferret out, not only general biases, but also biases related to the particular type of case, and to the particular defense being presented.
- c) The Defender should be alert to any irregularities in the composition or selection of the venire, and should raise proper challenges to those irregularities.
- d) The Defender should be familiar with the judge's practices for selecting a jury and should raise any proper challenges to those procedures.
- e) The Defender should be familiar with the *voir dire* practices of the prosecutor trying the case, and should be prepared to challenge any improper actions of the prosecutor.
- f) The Defender should, before jury selection, obtain as much information as possible concerning prospective jurors including, but not limited to, a jury list, which the Defender may use to investigate venire persons via Case.net, social media, and other appropriate sources.

### **VIII-6.2 Examination of Prospective Jurors**

- a) *Voir dire* is an opportunity to communicate directly with potential jurors, not only to uncover information to allow for proper and intelligent use of peremptory challenges and challenges for cause, but also to establish rapport with jurors and to begin telling the client's story.
- b) The Defender should object to improper *voir dire* questions posed by the prosecutor or court.
- c) The Defender should consider requesting individual *voir dire* outside the presence of other jurors, particularly if the questions seek to elicit sensitive information or responses would contaminate the jury pool.

### **VIII-6.3 Challenges**

- a) The Defender should challenge for cause all venire persons who appear prejudiced or biased against defense positions, unless sound tactical reasons dictate otherwise. The Defender should document all challenges and include them in motion for new trial if the challenge is denied. The names of prospective jurors and race and gender information should be documented in the trial file on a document that does not need to be returned to the court at the completion of *voir dire*.
- b) When challenges for cause are not sustained, the Defender should consider exercising peremptory challenges.
- c) In exercising challenges for cause and peremptory challenges, the Defender should consider the total number of peremptory challenges available, as well as the venire person who may replace a person who is removed.
- d) The Defender should make every effort to consult with the client in exercising challenges.
- e) The Defender should be alert to prosecutorial misuse of challenges, and object to and seek remedial measures for such misuse (e.g., race, gender, etc.).

#### **VIII-6.4 Further Investigation after Selection**

Once the court has selected actual jurors for the case, the Defender may request a recess to review Case.net to determine if any such jurors have prior criminal convictions that were not disclosed in *voir dire*, and if so, immediately bring such convictions to the trial court's attention and object to seating of such jurors. Failure to do so may waive appellate review of the eligibility of such jurors to serve.

#### **VIII-7 Opening Statement**

##### **VIII-7.1 Timing of Opening Statement**

The Defender should give an opening statement immediately after the statement of the prosecutor unless strategic considerations dictate otherwise. The opening statement should not be waived or deferred without a compelling reason.

##### **VIII-7.2 Goals and Limitations of Opening Statement**

a) The Defender should consider the following:

- 1) Delivering opening statement with limited, if any, use of notes.
- 2) Using "story telling" techniques that give an overview of the defense theory of the case.
- 3) Describing important exhibits which will be introduced and their relationship to the case.
- 4) Identifying the weaknesses of the State's case.
- 5) Reminding the jury of the State's burden of proof.
- 6) Clarifying the jury's duties and responsibilities.
- 7) Establishing a rapport with the jury.

b) The Defender should seek to confine the prosecutor within the proper boundaries of opening statements, by objecting to an opening that exceeds those boundaries unless there is a compelling reason not to object. The Defender should request appropriate relief from a prosecutor's improper opening, including a cautionary instruction, mistrial, or other appropriate relief.

c) The Defender should be cognizant of "promises" about evidence that the prosecutor makes in the opening statement and be prepared to emphasize in closing argument that the prosecutor did not keep the promises.

#### **VIII-8 Confronting the State's Case**

##### **VIII-8.1 Cross Examination, Including Impeachment and Challenges to Witness Competency**

- a) The Defender should anticipate all issues that are likely to arise during the State's case and prepare to meet them.
- b) The Defender should prepare for and be alert to inconsistencies, variations, contradictions, and omissions within a particular witness's testimony, and between that

witness's testimony and the witness's prior statements. The Defender should use those inconsistencies to impeach the witness where it furthers the defense theory.

c) The Defender should prepare for and raise issues relating to the witness's competency, which includes mental condition; statutory privileges; and the ability to observe, remember, and relate events.

d) The Defender should prepare for and present evidence challenging a witness's credibility, including evidence of bias, plea agreements for testimony, etc.

e) The Defender should be prepared to impeach a witness's credibility using certified copies of prior convictions.

### **VIII-8.2 Response to Undisclosed Evidence**

If the Defender is surprised by any new testimony or evidence which should have been provided in discovery but was not, the Defender should object to and challenge the evidence based upon the discovery failure unless there is a reasonable, articulable strategic reason not to object. In making an objection, the Defender should seek appropriate relief or sanctions, including exclusion of evidence or witnesses, mistrial, dismissal of the case, continuance, cautionary instruction, or other appropriate relief.

## ***VIII-9 Motions for Judgment of Acquittal at Close of State's Case and Close of All the Evidence***

### **VIII-9.1 Motion for Judgment of Acquittal at Close of State's Case**

At the close of the State's case, and out of the presence of the jury, the Defender should move orally and in writing for judgment of acquittal at the close of the State's evidence. The Defender should set forth with specificity the grounds for the motion, particularly emphasizing any charges or elements for which proof has been deficient. The Defender should obtain from the court and for the record an immediate ruling on the motion.

### **VIII-9.2 Motion for Judgment of Acquittal at Close of All the Evidence**

If a defense case is then presented, at the end of all of the evidence, and outside the hearing of the jury, the Defender should move orally and in writing for judgment of acquittal at the close of all of the evidence, again setting forth the grounds for relief with specificity, and again emphasizing those charges or elements for which sufficient proof has not been elicited. The Defender should obtain for the record a ruling from the court on the motion.

## ***VIII-10 Preparing & Presenting the Defense Case***

### **VIII-10.1 Discussion with Client about Whether to Present Defense Case**

In preparing the defense, the Defender should consider and discuss with the client whether the defense should present any evidence, particularly in light of what rebuttal evidence the State could produce in response.

### **VIII-10.2 Preparation for Defense Case**

- a) In preparing the defense case, the Defender should organize the case and prepare using a trial checklist or organization method. *See Section VIII-2 Trial Checklist and Organization.*
- b) The Defender should meet with and prepare defense witnesses for testimony and cross-examination. Such preparation may include explaining leading and open-ended questions, reviewing prior statements, discussing anticipated cross-examination questions, describing appropriate attire and courtroom demeanor, and explaining the objection process.

### **VIII-10.3 Conduct of Direct Examination**

In conducting direct examination of witnesses, the Defender should effectively present the theory of defense and anticipate and mitigate potential weaknesses in the testimony and theory.

### **VIII-10.4 Offer of Proof When State's Objection Sustained**

Should an objection to the Defender's direct examination be sustained, the Defender should make appropriate efforts to re-phrase the question(s), and to the extent the Defender is prevented from eliciting the testimony sought, should take steps to preserve the issue by making an appropriate offer of proof. *See Section VIII-14 Establishing an Appellate Record.*

### **VIII-10.5 Client Testimony**

- a) Well in advance of trial, and again before the client would take the stand, the Defender should discuss the risks and benefits of the client's testimony. The decision to testify belongs to the client, and the Defender should honor the client's decision.
- b) When the client chooses to testify, the Defender should prepare the client in advance for testimony and cross-examination.
- c) The scope of cross examination of a criminal defendant is limited to the scope of the direct examination under Sections 491.070 and 546.260, RSMo. The Defender should make timely and specific objections to any improper cross of the client.

### **VIII-10.6 Preventing Improper Cross-Examination of Defense Witnesses and Redirect**

- a) The Defender should, through pretrial motions and trial objections, take steps to prevent improper cross-examination of defense witnesses.
- b) When appropriate, the Defender should conduct re-direct examination of witnesses to clarify issues and to rehabilitate witnesses.

### **VIII-11 Closing Argument**

- a) The Defender should be familiar with the law and the particular trial judge's practices concerning substance of closing arguments, time limits, and objections.
- b) The Defender should use story-telling techniques in closing argument to persuasively argue the defense theory of the case. In addition, the Defender should consider doing any or all of the following in closing argument:

- 1) Highlighting weaknesses in the State's case, including emphasis on missing evidence.
- 2) Highlighting strengths in the defense case.
- 3) Drawing favorable inferences from the evidence.
- 4) Emphasizing the weighty burden upon the State of proof beyond a reasonable doubt.
- 5) Emphasizing that the State failed to meet its burden to show the elements of the offense under the jury instructions.

c) Whenever the prosecutor exceeds the scope of permissible argument, the Defender should object and request appropriate relief through cautionary instructions and/or mistrial.

### ***VIII-12 Jury Instructions***

#### **VIII-12.1 Preparation for and Conduct of Jury Instruction Conference**

- a) The Defender should be familiar with up-to-date Missouri Approved Instructions and Notes on Use applicable to the case.
- b) The Defender should seek to obtain the State's instructions before trial, where possible, so that the Defender may review them, prepare responsive instructions, and prepare objections.
- c) The Defender should proffer instructions in writing and in the proper form. The Defender should also be familiar with the particular trial judge's practices concerning submission and ruling upon proposed instructions.
- d) The Defender should prepare and offer appropriate instructions for the defense, including but not limited to, converse instructions, lesser-included offense instructions, and self-defense instructions.
- e) Where the facts of the case justify it, the Defender should be prepared to submit to the court modified pattern instructions or instructions drafted outside of MAI tailored to the particular circumstances of the case. Where such instructions are submitted, the Defender should provide the court any available case law in support of the proposed instructions.
- f) The Defender should compare all verdict directors to the relevant charging statute to be certain that the instructions conform to the statute. If the instructions do not conform to the statute, the Defender should object on this basis, and offer alternative instructions that conform.
- g) The Defender should make specific objections to improper instructions proposed by the court or the prosecutor.
- h) If the court refuses to adopt instructions requested by the defense, or gives instructions over defense objections, the Defender should take all steps necessary to preserve the issue on the record and for appeal, particularly making certain that the court files marked copies of the refused defense instructions.

### **VIII-12.2 Deviations by Court in Reading Instructions**

During the court's reading of instructions, the Defender should be alert to any deviations from the written instructions, and should, where necessary, object to or request relief from deviations made by the court.

### **VIII-12.3 Supplemental Instructions after Deliberation Commences**

If during jury deliberations the court or prosecutor proposes giving supplemental instructions to the jury, whether upon the request of the jurors or upon their failure to reach a verdict, the Defender should make a record voicing input concerning the form and propriety of the instructions, and registering any objections to improper or unwarranted supplemental instructions.

### **VIII-13 Jury Deliberation and Verdict**

While the jury is deliberating, the Defender should remain available for questions and requests from the jury.

### **VIII-13.1 Requests for Exhibits**

If the jury requests a specific exhibit, the Defender should consider whether to object to sending an individual exhibit to the jury room and be prepared to suggest alternatives if appropriate. The Defender should usually object to sending any testimonial exhibits or a replay of some or all testimony, unless the Defender determines that the testimonial evidence furthers the defense theory.

### **VIII-13.2 Questions from the Jury**

- a) Generally, the Defender should be alert to any response to a question that is not in the vein of "You must be guided by the evidence and the instructions as you heard them." The Defender must realize that agreeing to anything other than that response waives any objection to the response to the question on appeal.
- b) However, if a question relates to a matter of law where the answer is clear, the Defender may request that the judge answer the question with specificity. The judge may be required to give a specific answer to a legal question in certain circumstances. *See Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946). The Defender should propose a specific answer and object if the judge refuses to give it.

### **VIII-13.3 Extended Deliberations and "Hammer Instruction"**

The Defender should consider objecting to "hammer instructions."

### **VIII-13.4 Procedure after Guilty Verdict**

If the jury returns a guilty verdict, the Defender should:

- 1) Be alert to any improprieties or inconsistencies in the verdict, and raise proper and timely objections.

- 2) Request that the jury be polled, except in rare and exceptional circumstances. If, during polling, it becomes apparent that the verdict was not unanimous, the Defender should weigh whether to request a mistrial or to allow the Court to give a "hammer instruction" and permit further deliberation.

### **VIII-13.5 No Jury Polling After Acquittal**

The Defender should not request that the jury be polled if there is an acquittal.

### **VIII-14 Establishing Appellate Record**

#### **VIII-14.1 Ensuring Proceedings Are Recorded, Stenographer Preferable**

The Defender should prepare for and understand the importance of establishing a complete record of the trial proceedings for appellate purposes. This begins with ensuring that the entire proceedings are recorded, preferably by a stenographer rather than through a tape-recording device.

#### **VIII-14.2 Limitations of Pre-trial Motions and Need to Renew Objection at Trial or Make Offers of Proof**

- a) Pretrial rulings (such as those on motions *in limine*) are interlocutory because they may change at trial and therefore they are not subject to appellate review unless the objection is renewed at trial. The attorney *must object* when the evidence is presented during trial, and preserve in the new trial motion that the trial court erred in overruling the objection at trial and admitting the evidence. *The appealable legal error is the overruling of the trial objection and admission of the evidence at trial.* A claim of error that the "trial court erred in overruling a pretrial motion *in limine*" preserves nothing for appellate review.
- b) Where the trial court has sustained a pretrial State's motion *in limine* to prevent the defense from presenting evidence at trial, the Defender should still, during trial, request that the court reconsider its motion *in limine* ruling, attempt to offer the evidence during trial, make an offer of proof if the court continues to not allow the evidence, and preserve this in the new trial motion. *The appealable issue is not that the trial court sustained the State's pretrial motion in limine. The appealable issue is that the trial court erred at trial in not reconsidering the motion in limine to permit admissible evidence, and in refusing to allow the defense to present admissible evidence during trial.* Failure to attempt to offer the evidence at trial and make an offer of proof at trial waives the issue for appeal.
- c) In order to preserve for appellate review any legal issues raised before trial (such as in a Motion to Suppress), the Defender should make proper and timely objections at trial in accordance with the issues raised in the particular pretrial motion. The Defender should always object at the earliest opportunity to objectionable matters, and continue to object each time the objectionable matter is raised.
- d) When making any trial objection, the Defender should make certain that the objection is timely made and fully states the grounds upon which the objection is made, including

stating a federal and state constitutional basis for each objection. All objections must be constitutionalized.

e) The Defender should make an offer of proof of evidence deemed by the trial court to be inadmissible. Testimonial offers of proof by calling the actual witness are preferred over the Defender merely stating what the evidence would be if a witness testified. In order to preserve the issue for appeal, the Defender must state the legal basis for the admission of the evidence, in addition to offering the evidence.

#### **VIII-14.3 Preserving Rulings and Rationale on the Record**

Some judges may fail to or avoid making rulings on objections. The Defender should request that the judge rule on all objections on the record and state the reasons for adverse rulings. A judge's statement such as "Move along" is not an appealable ruling on an objection.

#### **VIII-14.4 Seeking Appropriate Relief When Objection Sustained**

a) The Defender should seek appropriate relief, such as a cautionary instruction or a mistrial, when a defense objection is sustained and further relief is required.  
b) If the requested relief is granted there is nothing left to appeal. For this reason, the Defender should request the highest level of relief available (e.g., mistrial).

#### **VIII-14.5 Preserving Exhibits**

a) The Defender should keep a record of and be certain that all exhibits used at trial are permanently preserved for later appellate review. The Defender should make and keep an exhibit list which lists all exhibits (State and defense) used at trial, objections thereto, and whether such exhibits were admitted into evidence. The Defender should keep originals or copies of all defense exhibits in the client's file. If the original exhibits are kept by third parties (e.g., the circuit clerk), a memo must be added to the client file to reflect where those exhibits are located so that any later attorney can find the exhibits. Electronic exhibits (such as PowerPoint presentations presented in court) must be clearly marked as exhibits at trial, and preserved so that they can be used for appellate review. Whenever possible, "paper copies" of electronic exhibits should be made, marked as duplicate exhibits of the electronic version, and preserved so that an appellate court can later review the exhibits.

b) When exhibits are used or discussed at trial by either the State, defense, court or witnesses, the Defender should take steps to ensure that a reader of a later transcript will understand what happened at trial. For example, vague references to "this exhibit" should be avoided. Instead, the exhibit should be clearly described by number, letter, or other specific description. When a witness points to an exhibit, it should be made clear in words exactly what the witness was pointing to.

c) Where a Defender objects to a State's exhibit, the Defender should describe in words in detail what the exhibit shows and why it is objectionable.

#### **VIII-14.6 Describing Improper Behavior for the Record to Preserve Objection**

Where a Defender makes an objection to improper behavior in the courtroom during trial (such as a spectator making a comment or a juror sleeping), the Defender should state in words exactly what behavior is occurring and why it is objectionable. The Defender should consider calling witnesses to the objectionable behavior, so that a later transcript will clearly reflect what occurred.

#### **VIII-15 Motion for New Trial**

##### **VIII-15.1 Safeguarding Client's Right to Appeal**

After conviction at trial, the Defender should discuss with the client the right to appeal and the advisability of such action. Unless the client makes an informed decision not to appeal, the Defender should take all steps to safeguard the right to appeal. Those steps include preparing and timely filing an appropriate new trial motion in *jury trial* cases only. (For other requirements necessary for appeal, see Section X-1 Direct Appeal.)

##### **VIII-15.2 Requesting Additional Time to File Motion after Jury Finding of Guilt**

- a) At the time a guilty verdict is received in a jury trial case, the Defender should request an additional 10 days in which to file a post-trial motion. Such requests do not preclude an earlier filing of the motion if the Defender is able to do so.
- b) In *jury-tried* cases, the Defender should file a Motion for Judgment of Acquittal or in the Alternative for New Trial within the allotted time (15 days which may be extended by the court for an additional 10 days). The Defender should be aware that this time limit is absolute and inflexible. The trial court has no authority to extend the time beyond 25 days. Jury-tried cases require a timely-filed new trial motion to preserve issues for appeal.

##### **VIII-15.3 New Trial Motion Should Not Be Filed After Bench Trial**

In *bench-tried* cases, a new trial motion (post-trial motion) should not be filed because it will limit the issues that can be raised on appeal. Unlike jury trial cases, bench trial cases do not require a new trial motion (post-trial motion) in order to preserve issues for appeal.

##### **VIII-15.4 Contents of Motion for New Trial**

The Motion for Judgment of Acquittal, or in the Alternative for New Trial, should include, with specificity, every ground known for setting aside the verdict and acquitting the client or granting a new trial, including but not limited to, claims of error regarding pretrial proceedings, jury selection, objections made at trial, jury instructions, and any other grounds that may benefit the client on appeal. If there is any question whatsoever about the merits of an issue, it should be included in the post-trial motion. Failure to include any ground in a post-trial motion will result in it being considered on appeal, if at all, under the stringent plain error rule. There is no penalty for including meritless points in the post-trial motion.

### **VIII-15.5 Seeking Timely Ruling on Motion for New Trial**

The Defender should seek a timely ruling on the post-trial motion.

### **VIII-15.6 Preparing to Argue the Motion for New Trial**

The Defender should be prepared to argue the post-trial motion orally to the court, unless there is a tactical reason for not doing so.

### **VIII-15.7 Motion for New Trial After Discharge of Jury Without Reaching a Verdict**

The Defender should prepare a motion for judgment of acquittal after a jury has been discharged without reaching a verdict as authorized by Rule 27.07(c).

## **IX. SENTENCING**

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### ***IX-1 Waiver of Jury Sentencing***

#### **IX-1.1 Discussion and Advice to Client Regarding Waiver**

a) The Defender should advise the client of the option to waive a jury for sentencing, and the likely consequences thereof, considering the particular judge's sentencing history. There should not be a presumption that jury sentencing will be adverse to the client. Each case should be considered on its own merits in determining whether to have jury or judge sentencing. This decision can only be made after full investigation of the matter, and should be an informed, strategic decision made by the client after full investigation and information.

b) The decision to waive a jury for sentencing should be a tactical decision to benefit the client, and should not be undertaken because the Defender has failed to prepare for sentencing.

#### **IX-1.2 Timing of Waiver**

If the client chooses to waive a jury for sentencing, the Defender must ensure this is done before trial commences in accordance with court rules.

### ***IX-2 Sentencing Hearing—Preparation and Conducting***

#### **IX-2.1 Sentencing Phase in Bifurcated Trial**

If there is a bifurcated trial pursuant to 557.036 RSMo. the Defender should develop a theory and theme for sentencing phase and prepare by:

- 1) Investigating potential mitigating evidence in the client's medical, social, psychological, psychiatric, educational, family, and criminal history.
- 2) Ensuring sufficient resources are available to prepare effectively, including but not limited to access to experts, investigators, and mitigation specialists.

- 3) Being familiar with the rules of evidence and standard of proof which govern sentencing.
- 4) Investigating the sentencing practices of the jurisdiction and of the specific judge.
- 5) Objecting to improper evidence by the State.

### **IX-2.2 Sentencing Hearing**

a) In preparing for the post-trial sentencing hearing before the judge, the Defender should prepare an individualized, client-centered sentencing plan that includes consideration of, and discussion with the client about, the following:

- 1) The range of punishment for each convicted offense, the possibility of concurrent or consecutive sentencing, mandatory minimum terms and parole eligibility guidelines. Where advising a client on parole eligibility, the Defender should exercise caution when telling a client when the client will be paroled since parole is beyond the Defender's control.
- 2) The collateral consequences of conviction and sentence.
- 3) The client's goals.
- 4) The client's prior arrest and conviction history, if any.
- 5) Any victim impact statement to be presented and how to respond appropriately to the statement.
- 6) Any need for pre-sentence mental examination and/or commitment to a mental hospital.
- 7) Any need for retaining a mitigation/sentencing specialist as an aid to sentencing.
- 8) The sentencing practices of the judge.
- 9) The position of the probation department with respect to the client.
- 10) The sentencing recommendation of the prosecutor.
- 11) The likely conditions of probation, particularly requirements for restitution and the client's eligibility for Earned Compliance Credits.
- 12) The alternative forms of probation available to the court, including county jail shock, Community Sentencing Program, community service, and the power of the court to retain jurisdiction for 120 days for shock or treatment programs within MDOC.
- 13) Any other information, evidence, or proposal that may be helpful to the client.

- b) If the judge has not ordered a Sentencing Assessment Report, the Defender should discuss with the client the risks and benefits of obtaining one.
- c) The Defender should prepare the client for the Sentencing Assessment Report interview, including a discussion of whether the client should respond to questions if an appeal is anticipated. The client should be prepared for likely questions from the Probation Officer.

- d) The Defender should obtain a copy of the Sentencing Assessment Report, if one was prepared, and at the earliest opportunity before sentencing ensure that the client has a full and fair opportunity to review it. The Defender should determine the accuracy and completeness of all information contained in the report, and should take steps necessary to challenge and correct erroneous information or omissions. The Defender should consider submitting an independent sentencing memorandum.
- e) The Defender should discuss with the client any sentencing recommendations to be made by the defense together with the reasons for the recommendations.
- f) The Defender should prepare the client and/or witnesses to address the court, where appropriate. The Defender should discuss with the client the impact of the client's statement on a possible appeal and/or retrial of the case.
- g) At sentencing, the Defender should seek the best possible disposition for the client that is consistent with the client's goals.
- h) The Defender should ensure that any plea agreements are enforced.
- i) The Defender should make certain that any sentence imposed does not exceed the maximum sentence allowed and that the judge does not have a misunderstanding about whether sentences must run consecutive to each other.
- j) The Defender should consider a challenge to any inappropriate conditions of probation ordered by the court.
- k) The Defender should be prepared to address client care issues with the court, such as requests to delay reporting for confinement, institutional assignment, and mental and medical health issues.

#### **IX-2.3 Request for Appeal Bond**

The Defender should consult with the client about requesting that the court set an appeal bond where the client has been convicted after trial, plans to appeal, and is eligible for bond.

#### **IX-2.4 Advice Regarding Effectiveness Inquiry**

- a) Before sentencing, the Defender should advise the client that the court will ask about the effectiveness of plea or trial counsel. *See Rule 29.07(b) (4).*
- b) The Defender should advise the client on the matter so that the client may prepare and appropriately respond, but the Defender should exercise caution, especially in guilty plea cases. The Defender should not tell a client not to voice complaints about counsel, but the Defender should advise the client if a particular judge may refuse to accept a guilty plea should the client voice complaints.
- c) In most situations, the Defender should advise the client to say (1) whatever known complaints the client may have about counsel, and (2) that the client is not an attorney and would want to consult with a post-conviction attorney before being able to know and list all possible grounds for post-conviction relief.

d) After sentencing, the Defender should advise the client of the right to seek relief under Rules 24.035 and 29.15; how to seek relief under the Rules; and answer questions the client may have or promptly refer the client to an Appellate/Post-conviction Defender to do so.

### ***IX-3 Post-Sentencing Counseling and Issues***

#### **IX-3.1 Counseling Client Regarding Sentence and Probation Terms**

The Defender should verify that the client understands the court sentence, especially any conditions of probation. The Defender should give guidance to help the client meet the probation conditions, including payment of fines, restitution and costs, completion of community service, participation in treatment programs, and other conditions.

#### **IX-3.2 Monitoring Sentences with Call-Back Provisions**

In cases where the client is sentenced under 120-day call back provisions, long-term treatment, or any similar program, the Defender should continue to monitor the case to ensure that the client is released or is provided with due process in the event the court exercises its authority to deny release. The client file should not be closed until the Defender determines the outcome of the call back request.

#### **IX-3.3 Ensuring Client Receives Jail Time Credit**

a) The Defender should understand the jail time credit to which a client is legally entitled and should seek to ensure that the client receives that credit.

b) In order to assist the client in obtaining jail time credit, the Defender may:

- 1) Obtain and submit documentation to the court or Department of Corrections.
- 2) Seek to have the sentencing judge declare that sentencing in the case is "related to" confinement in another county or "related to" another case. *See Goings v. Missouri Dept. of Corrections*, 6 S.W.3d 906 (Mo. banc 1999). The Defender should provide the sentencing court with any and all information about time confined in a juvenile detention facility related to the case subject to sentencing.
- 3) Pursue judicial relief, where necessary, to ensure that a client receives all jail time credit due. Judicial relief may include, but is not limited to, litigating a declaratory judgment action to force the Department of Corrections to award jail time credit.

## X. APPEAL AND POST-CONVICTION

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### **X-1 Direct Appeal**

#### **X-1.1 When MSPD Represents on Appeal**

- a) MSPD should represent all eligible persons convicted of a felony after trial, regardless of whether the person was sentenced to a term of imprisonment, a suspended execution of sentence, or a fine only. *See Sec. 600.042.4(1) RSMo.*
- b) MSPD should represent all eligible persons convicted of a misdemeanor after trial *only* when the sentence imposed upon the client includes a past, present, or potential future term of incarceration. MSPD should not represent a person convicted of a misdemeanor after trial and sentenced to a fine only. *See Sec. 600.042.4(2).* A “term of incarceration” includes a sentence for which credit for time served in the past has been awarded (even if this means in practice that a client will not serve additional jail time after trial), a post-trial term of incarceration, or a suspended execution of sentence. The purpose of providing representation to persons who have received credit for time served is to ensure that such persons are not treated differently for appellate purpose than persons who were able to post bond before trial, and therefore, were incarcerated only after trial.
- c) In misdemeanor cases where a client wishes to appeal, but is not eligible for MSPD representation on appeal because the client received a fine only, the Defender should still file a notice of appeal (as well as motion to proceed *in forma pauperis* and proposed order granting the motion), but should indicate on the notice of appeal form (and in the *in forma pauperis* motion) that the client will be representing himself or herself, or will be retaining private counsel for appeal. Filing a notice of appeal is mandatory, even if MSPD will not be representing the client on appeal, because attorney ethics rules generally require such a step to properly conclude trial representation. The Defender should be aware that writing MSPD’s name or an MSPD Defender name on the notice of appeal will enter MSPD into the appeal; hence, this should be avoided. A client may sign a notice of appeal form in lieu of the Defender in such situations.

#### **X-1.2 Counseling Client Regarding Appellate Remedies**

After a guilty verdict in a misdemeanor or felony trial, the Defender should discuss with the client all available appellate remedies, and should counsel the client on the merits of pursuing an appeal. Such advice should include the likelihood of success on appeal and any adverse consequences of an appeal, such as the possibility of receiving a longer sentence on retrial (if applicable).

#### **X-1.3 Perfecting Appeal Mandatory for Defendant Even if Not Representing on Appeal**

- a) Where the client wishes to appeal, the Defender should take all legal steps necessary to perfect the appeal, including filing a timely notice of appeal, a motion to appeal *in forma pauperis*, and a proposed order granting such motion. If the client is uncertain or undecided whether to appeal, the Defender should err on the side of perfecting the appeal,

since a client may always choose to dismiss the appeal later in the appellate process. Properly perfecting an appeal (i.e., preserving the client's right to appeal) for clients wishing to appeal is mandatory for a Defender to conclude a trial case, even if MSPD will not be representing the client on appeal.

- b) The Defender should be aware of all current court rules regarding perfecting an appeal and should comply with them, including any special rules for perfecting an appeal imposed by the particular Court of Appeals district.
- c) The Defender retains responsibility for the case until an appellate Defender or private attorney assumes representation on appeal.
- d) After a Defender files a notice of appeal, the Defender should immediately notify the applicable Appellate Office that such appeal has been filed.

## ***X-2 Post-Conviction***

### **X-2.1 Conduct of Defender and Staff—Cooperation with Post-Conviction Defender**

- a) MSPD supports the rights of clients to seek post-conviction relief from wrongful convictions and sentences, and is committed to zealous advocacy in post-conviction proceedings. While allegations in a post-conviction action usually center on plea or trial Defender's effectiveness under the Sixth Amendment, it is important to note that the action is not against the plea or trial Defender, and those Defenders are not a party. Rather, the action is against the State, and it is the validity of the State's judgment of conviction and sentence that is at issue. All employees (Defenders and non-attorney staff) must recognize that the plaintiff in a post-conviction action is a client of MSPD, and all representational standards continue to apply throughout any post-conviction action.
- b) All employees should conduct themselves in an appropriate and professional manner during the post-conviction process.
- c) All employees should cooperate with other system employees to assure the highest quality of representation for clients during the post-conviction process.
- d) The plea/trial Defender should cooperate with the post-conviction Defender when contacted to discuss matters pertaining to the preparation and litigation of the client's case.

### **X-2.2 Filing of Post-conviction Motion Not a Waiver of Confidentiality**

The filing of a post-conviction motion does not waive all attorney-client privilege. The client's attorney-client privilege remains in effect in full or in part. *Defenders should disclose information about the case only upon the express consent of the client or the post-conviction Defender, or as ordered by the court.*

### **X-2.3 Communication with Court or Prosecutor**

- a) The plea/trial Defender should not communicate with the Court concerning the client's case except when called as a witness on behalf of a party to the litigation.
- b) If called as a witness at a hearing or a deposition, the Defender should not volunteer information but should fully and truthfully answer questions asked.

c) If the plea/trial Defender is contacted by the prosecutor about a post-conviction case, the Defender should state that the Defender cannot voluntarily answer questions or provide information without the consent of the client or the client's post-conviction Defender because of the Defender's ongoing ethical obligations of confidentiality. The Defender should state that, without such consent, the Defender can answer questions only through testimony by deposition or in court.

d) It is inappropriate for the plea/trial Defender whose representation is questioned in the post-conviction action to act or give the appearance of advocacy against the former client. At a court hearing, the plea/trial Defender should behave as a witness. The plea/trial Defender should not sit at counsel table or otherwise provide advocacy assistance to the prosecuting attorney against the former client.

## **XI. PROBATION VIOLATIONS**

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### ***XI-1 Investigation and Disposition of Probation Violations***

Where the Defender represents a client in a probation violation matter, the Defender should:

- 1) Interview the client about the matter to obtain all relevant information about the charged violation, the underlying criminal case, and mitigating circumstances.
- 2) Obtain all relevant documents alleging the violation, including witness statements or police reports. The Defender should obtain such documents through discovery or other channels and, where appropriate, seek a court order for the Probation Officer's file.
- 3) Independently investigate the alleged violation, interview witnesses regarding whether the violation may or may not have occurred, determine whether the State is able to prove the violation, and prepare any factual or legal defenses thereto.
- 4) Investigate and present mitigating circumstances which may reasonably cause a court not to revoke probation, including circumstances surrounding the violation and the history or character of the client (e.g., employment, education, physical health, mental health, family circumstances).
- 5) Prepare and present an alternative sentencing plan which may persuade a court not to revoke probation.

### ***XI-2 Representing Probationers outside Geographic Area of MSPD Office***

Where a person is incarcerated in the Department of Corrections but has a probation violation case pending in a Missouri county, the MSPD Office where the violation is pending should undertake representation of the person and not wait until the person is released from the DOC. Undertaking prompt representation will often provide the client with an opportunity to receive concurrent time on a probation violation, which would be lost if the

violation were not dealt with until the person is released from the DOC. Where necessary to comply with Sec. 600.042.4(3) and 559.036, the Defender should seek an order stating whether or not due process requires counsel for the defendant. Prior to seeking any due process order the Defender should evaluate whether notifying the Court is in the best interest of the client, and counsel the client on not taking action on the matter until the term of probation has expired. See, e.g. State ex rel Jones v. Eighmy, 572 S.W. 3d 503 (Mo. Banc 2019); State ex rel Zimmerman v. Dolan, 514 S.W. 3d 603 (Mo. Banc 2017).